(19,073.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 119.

ISAAC N. E. ALLEN AND ALEXANDER S. BACON,
PLAINTIFFS IN ERROR,

vs.

THE ALLEGHANY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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1 New Jersey Supreme Court.

THE ALLEGHENY COMPANY
vs.
ISAAC N. E. ALLEN and ALEXANDER S. Bacon.

On Contract. On *Postea.* James A. Gordon, Attorney.

As yet of the fifteenth day of May, A. D. one thousand nine hundred and one.

Witness, David A. Depue, Esquire, chief justice.

WILLIAM RIKER, JR., *Clerk.*

HUDSON COUNTY, *ss:*

Isaac N. E. Allen and Alexander S. Bacon, the defendants in this suit were attached of their goods, chattels, lands and tenements to answer unto The Allegheny Company, a body corporate, the plaintiffs herein, in an action upon contract, and the said defendants having caused their appearance to be entered in said suit, thereupon the plaintiffs by James A. Gordon, their attorney, complain; for that whereas, the defendants as partners trading as I. N. E. Allen & Company heretofore, to wit, on the fourth day of January, in the year of our Lord, one thousand nine hundred and one, at New York city in the State of New York, to wit, at Jersey City, in the county of Hudson in the State of New Jersey, were indebted to the plaintiffs in the sum of two thousand dollars for goods, wares and merchandise before that time sold and delivered by the plaintiffs to the defendants at their request; and in two thousand dollars for work and labor before that time done and performed and materials furnished by the plaintiffs for the defendants
2 at their request; and in two thousand dollars for so much money by the plaintiffs before that time lent and advanced to the defendants at their request; and in two thousand dollars for so much money by the plaintiffs before that time paid for the use of the defendants at their request; and in two thousand dollars for so much money by the defendants before that time had and received for the use of the plaintiffs; and in two thousand dollars for interest upon, and for the forbearance by the plaintiffs to the defendants at their request of divers large sums of money before that time due and owing from the defendants to the plaintiff-; and in two thousand dollars for so much money then and there found to be due from the defendants to the plaintiffs on an account stated between them; and being so indebted, the defendants in consideration thereof, then and there promised the plaintiffs to pay the said several sums of money on request. Yet the defendants disregarded their said several promises and have not paid the said several sums of money, nor any of them, or any part thereof, although often re-

quested so to do, but to do so have hitherto wholly refused, and still do refuse, to the damage of the plaintiffs two thousand dollars, therefore they bring their suit, &c.,

Notice is hereby given that this action is brought to recover the amount due on a note of which the following is a true copy:

$1,989.54. NEW YORK, *July* 16, 1900.

Three months after date we promise to pay to the order of Allegheny Company, nineteen hundred and eighty-nine 54/100 dollars, at 31 Nassau street, New York.

Value received.

I. N. E. ALLEN & COMPANY.

No. 21222. Due ——. $1989.54.

JAMES A. GORDON,
Attorney of Plaintiff.

3 CREDIT.

October 17, 1900 by check	$700.00	
November 20, 1900 by check	300.00	
		$1000.00
Balance		989.54

Interest from October 16, 1900.

JAMES A. GORDON,
Attorney of Plaintiff.

And the said defendants, by Lindabury, Depue & Faulks, their attorneys, come and defend the wrong and injury, when &c. and say that they did not promise and undertake in manner and form as the said plaintiff hath above thereof complained against them and of this they the said defendants put themselves upon the country &c.

And for a further plea in this behalf, the said defendants by like leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided say that the said plaintiff ought not to be admitted to say that the defendants promised and undertook in manner and form as the said plaintiff hath thereof complained against them, because they say that after the making of the said several promises and undertakings in the plaintiff's said declaration set forth, to wit, on the twenty-eighth day of December, nineteen hundred, at New York in the county and State of New York, to wit, at Jersey City in the said county of Hudson, the said defendants were indebted to a large number of persons, to wit, fifty-five persons, in a large sum of money to wit, forty thousand dollars, which they the said defendants were then and there unable to pay.

And the defendants further aver that thereupon, to wit, on the day and year last aforesaid, at New York aforesaid to wit, at Jersey City aforesaid, in the said county of Hudson, a meeting of
4 the creditors of them the said defendants was held, and they the said defendants did then and there offer to their said creditors and each of them twenty per cent. of the face value of their respective claims against the defendants or either of them in full settlement thereof, payable five per cent. in cash on or about February 1, 1900, and fifteen per cents. in notes made by the said defendants and endorsed by one William Oppenheim payable five per cent. in four months and ten per cent. in eight months from said last mentioned date.

And the defendants further aver that the said plaintiff was present at the said meeting of the said creditors of the defendants and did then and there approve of the said offer so as aforesaid made by the defendants to their said creditors, and did accept the same, and did then and there recommend to the said other creditors of the defendants the acceptance by them of the said offer, to-wit, on the said twenty-eighth day of December, nineteen hundred, at New York aforesaid, to-wit, at Jersey City, in the said county of Hudson.

And these defendants further aver that afterwards, relying on the said acceptance and recommendation of the said offer by the said plaintiff, a large number, to-wit, forty-five of the other creditors of the said defendants, having claims against them for a large sum of money, to-wit, the sum of twenty-eight thousand dollars, did mutually accept the said offer and did accept and receive the said percentage of their said respective claims against the said defendants in cash and notes as aforesaid in full settlement of their said respective claims, and did thereupon discharge the said defendants from the respective claims of the said creditors last mentioned against them the said defendants, to-wit, on the said first day of February, 1901, to-wit, at Jersey City in the said county of Hudson.

And the defendants further aver that afterwards, to-wit, on
5 the said first day of February, 1901, to-wit, at Jersey City, in the said county of Hudson, the said defendants offered to the said plaintiff to pay to it twenty per cent. of the face value of its said claim against the defendants in full settlement thereof in cash and notes in accordance with the terms of the said offer, and the plaintiff did thereupon waive the tender to the said plaintiff of the amount of cash and notes dated and endorsed in accordance with the said offer, and that the plaintiff notwithstanding the premises did then and there refuse to accept or receive the same and from thence hitherto has refused and still does refuse so to do, although the defendant- *has* been at all times and still *is* willing to pay and deliver to the said plaintiff the amount of said offer in cash and notes as aforesaid in accordance with the terms thereof, and this they the said defendants are ready to verify.

Wherefore, they pray judgment if the said plaintiff ought to be admitted against its own conduct as aforesaid to say that the defend-

ants promised and undertook in manner and form as the said plaintiff hath above thereof complained against them.

The said plaintiff as to the first plea by the said defendants above pleaded, wherein they have put themselves upon the country, doth the like.

And as to the fourth plea by the said defendants above pleaded, the plaintiff says that it ought not to be precluded from having and maintaining its aforesaid action thereof against said defendants by reason of anything in said fourth plea alleged, because it says that it did not on the twenty-eighth day of December, nineteen hundred, or at any other time, accept or agree to accept from the defendants in full settlement of its claim against said defendants twenty per cent. of their claim against said defendants, payable five per cent. in cash on or about February first, nineteen hundred (or any
6 other time), and fifteen per cent. in notes made by the said defendants and endorsed by one William Oppenheim payable five per cent. in four months and ten per cent. in eight months from said last mentioned date; and of this the said plaintiff puts itself upon the country etc.

And the said defendants as to the said replication of the said plaintiff to the said fourth plea of the said defendants, and which the said plaintiff hath prayed may be inquired of by the country, do the like.

Therefore let a jury thereupon come before our chief justice or some other justice of the supreme court of the State of New Jersey, at a circuit court to be holden at Jersey City, in and for the county of Hudson, on the second Tuesday of September, in the year of our Lord, one thousand nine hundred and two, by whom, etc., and the same day is given to the parties aforesaid there etc..

And now at this day, to wit, the tenth day of November in the year of our Lord, nineteen hundred and two, before our said supreme court at Trenton comes the said plaintiff by its attorney aforesaid, and the justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, on the eleventh day of September, in the year of our Lord, one thousand nine hundred and two, at a circuit court holden at Jersey City, in and for the county of Hudson, before the Honorable Gilbert Collins, one of the justices of the supreme court of judicature of the State of New Jersey, according to the statute in such case made and provided, come the within named parties, plaintiff and defendants, by their respective attorneys within mentioned, and the jurors of the jury whereof mention is within made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oath say:
7 That the said defendants did undertake and promise in manner and form as the said plaintiffs have within complained against them, and they assess the damages of the plaintiff on occasion of the premises in their declaration mentioned at the sum of eleven hundred and eight dollars and fifty-four cents, over and

above their costs and charges by them about their suit in this behalf expended.

Therefore it is considered that the said plaintiff do recover against the said defendants its said damages by the jury in form aforesaid found to be the sum of eleven hundred and eight dollars and fifty-four cents, and also sixty six dollars and three cents for its costs and charges aforesaid, by the court now here adjudged to the said plaintiff and with its assent, which said damages, costs and charges in the whole amount to one thousand one hundred and seventy four dollars and fifty seven cents.

Judgment signed this this tenth day of November, A. D. nineteen hundred and two.

WILLIAM S. GUMMERE, *C. J.*

8 New Jersey Supreme Court, Hudson Circuit, September Term, 1902.

THE ALLEGHANY COMPANY
vs.
ISAAC N. E. ALLEN & ALEXANDER S. BACON.

James A. Gordon, Esq., for plaintiff.
Messrs. Lindabury, Depue & Faulks, Mr. Depue, for defendant.

This cause was tried at the Hudson circuit before Mr. Justice Collins, and a jury, September 11, 1902.

After the jury was drawn and sworn, Mr. Gordon opened the case on behalf of the plaintiff.

The execution of the note in question is admitted.

Counsel for the plaintiff offers the note in evidence.

Received and marked Exhibit P–1.

Mr. GORDON: By the pleadings payments of $700, and $300, on account of the note, October 17, 1900, $700.00, and November 20, 1900, $300, are admitted.

Plaintiff rests.

Mr. Depue then opened the case to the jury on behalf of the defendant-.

ALEXANDER S. BACON, called as a witness on behalf of the defendant-, being first duly sworn, testified as follows:

Direct examination by Mr. DEPUE:

Q. Where do you live?
A. In Brooklyn.
Q. You are one of the defendants in this suit?
A. I am.

Q. You were a member of the firm of I. N. E. Allen & Company in the year 1900?

9 A. I was up to September, that is, nominally so.

Q. And Mr. Allen the other defendant was the other member of the firm?

A. Yes, sir.

Q. What was the financial condition of the firm in the latter part of the year 1900?

A. It was insolvent.

Q. When the insolvency was discovered what was done?

A. A meeting of creditors was called by notice.

Q. About how many creditors had the firm at that time?

A. As I remember about 40.

Q. And in round numbers what was the amount of the indebtedness of the firm?

A. About $40,000 excluding a large amount of accommodation paper that we took no account of which is now being sued.

(By the COURT:)

Q. Where you were the accommodating party?

A. We were the accommodating party—or Mr. Allen was.

Q. When was this meeting held?

A. On the 28th of December, 1900.

Q. Where?

A. At the offices of the company on Nassau street; I have forgotten the number; I never had been in the office but once or twice in my life.

Q. In New York city?

A. In New York, yes, sir.

Q. Were you present at that meeting?

A. I was.

Q. Mr. Allen also present?

A. He was.

Q. Will you give us in your own way an account of what took place at that meeting?

The COURT: Wouldn't it be proper in the order of proof to prove the authority given to this gentleman, whom you mentioned in your opening, to represent the plaintiff?

Mr. DEPUE: I thought perhaps first we should prove what he did.

The COURT: You cannot prove his authority by proof of what he did. If you have at some stage of the case to prove his au-

10 thority, I will have to ask you to do is now. You might ask him—was there some one present at this meeting professing to represent the plaintiff?

A. There was, yes, sir.

Q. What was his name?

A. His name was Mr. Spaulding.

Direct examination of Mr. Bacon suspended.

EDWARD C. SPAULDING, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. DEPUE:

Q. Where do you live?
A. Scranton, Pennsylvania.
Q. What is your profession?
A. I am a certified public accountant holding a certificate from the State of Pennsylvania.
Q. Where do you practice your profession?
A. In Scranton Pennsylvania at present.
Q. You have practiced in New York, have you not?
A. Yes, sir.
Q. During what time where you in New York?
A. I came there the 1st of December 1900, and remained there until about the 1st of May, 1901.
Q. Are you employed by the plaintiff in this suit at this time?
A. I was employed at this time, yes sir.

The COURT: No, now, the present time?

Q. The present time, I mean.

(The COURT:)

Q. Are you now employed?
A. The only arrangement between us was that I was to come down here and testify in regard to this case.
Q. Otherwise you are not at present in their employ?
A. No, sir.
Q. Did you attend a meeting of the creditors of Isaac N. E. Allen & Company, on December 28, 1900?
A. I did.
Q. At that time you were in the regular employ of the Alleghany Company?
A. I was not.
11 Q. Their office is in Scranton, is it not?
A. Yes, sir.
Q. And has been for some time?
A. Yes, sir.
Q. Were you at that time a creditor of Isaac N. E. Allen & Company yourself?
A. No, I was not.
Q. For whom did you appear at that meeting?
A. I went there at the request of the Allegheny Company.
Q. And for what purpose?

Mr. GORDON: That is objected to on the ground that the authority would show.

The COURT: I think the point is well taken.

Q. By whom were you requested to go there?

A. I received a telegram from the Allegheny Company to attend the meeting.

Q. Have you that telegram here?

A. I have not; the attorney I think has.

Mr. GORDON: Do you call for its production?

Mr. DEPUE: I do.

Counsel for plaintiff produces telegram.

Q. (Telegram shown witness) Is that the telegram?

A. That is the telegram I received.

Q. Was that the only communication that you had with the Allegheny Company before the meeting?

A. I was sent there on two or three— one or two occasions before that to make a collection.

(By the COURT:)

Q. This is the only communication you have had?

A. I had others later, the next morning and the next day, other instructions and other——

Q. You had been employed by the Allegheny Company in this matter before this meeting, had you not?

A. That is all that I had been sent there for, to make col-
12 lections. I was acquainted with the Allegheny Company and they asked me as a favor to make this collection if possible of Allen.

Q. You had been to the office of the firm several times to see if you could secure collection?

A. I think two or three times.

Counsel for defendants offers the telegram in evidence.

Received and marked Exhibit D-1.

The COURT: What is the date of it?

Mr. DEPUE: December 28.

(By the COURT:) You happened to be in New York at that time?

A. I had an office in New York at that time.

Counsel for defendants reads telegram to the court and jury.

Q. At that meeting was a list of the creditors of Allen & Company called over?

A. It was.

Q. Did the various creditors who were present, or represented, respond?

A. Yes, a number responded to it.

Q. Did you respond for the Allegheny Company?

A. I did.

Q. In what way; will you tell us just what you did in the way of answering, what happened?

A. To the best of my memory when the name of the Allegheny Company was called I replied that I represented them.

Q. Who was elected chairman of that meeting?

A. I was.

Q. And was there a statement made by Colonel Bacon of the assets and liabilities of the firm?

A. There was.

Q. And an offer of compromise made by him on behalf of the firm?

A. I don't know whether the offer was made that day or the next day.

Q. Was there a committee of creditors appointed, or a committee appointed to examine the accounts and affairs of Allen & Company?

A. There was a committee of three appointed by the cred-
13 itors present to examine the books of Allen & Company, and verify the statements that had been made, and show what the exact condition of Allen & Company was.

Q. Who were the members of that committee?

A. H. C. McKelvey I think was the chairman, I was one of the members, and I do not know who the other member was; there were three in that committee.

Q. Was there an examination of the books made by that committee?

A. There was.

Q. Who actually made the examination?

A. I did; that is I did the most of the work in regard to investigating.

Q. How long did that examination continue; how long did it take to complete it?

A. The meeting adjourned about three o'clock, and I spent until about 9 or 10 that evening and I worked awhile next morning which was Saturday morning.

Q. Did the committee make a report?

A. They made a report on Saturday.

Q. An oral report or one in writing?

A. Well, it was a written report, and also some oral explanations.

Q. Is this the written report that was made signed by you and Mr. McKelvey? (Paper shown witness.)

A. That is the report, yes, sir.

Q. And this report was presented you say at the adjourned meeting on December 29?

A. That is my recollection of it.

Counsel for defendants offers the report in evidence.

Received and marked Exhibit D-2.

Counsel for defendants reads said report.

Q. Will you look at this paper which I show you, and see if you recognize that as the trust agreement that is spoken of in the committee's report?

14 Mr. GORDON: You don't mean it is the original one, but a draft.

Mr. DEPUE: It may be the original one; there were duplicate copies made.

(By the COURT:)

Q. Is that the paper, or a duplicate of it that accompanied this report?

A. I can't go over all these details and remember them; I notice that this paper is dated December 31, 1900, and is executed on the same day, signed I. N. E. Allen & Company, I. N. E. Allen, Alexander S. Bacon, William Oppenheim, E. F. Perry, Parmele Eckleson Lumber Company, by A. Alexander, president. Of course if it was signed and executed at that time it couldn't have been at the meeting.

The COURT: The question is not whether the signatures were on it, but whether the document referred to in the report was practically that document.

WITNESS: As far as I can tell it was.

Counsel for defendants offers the paper in evidence.

Counsel for plaintiff objects to it as far as the proof of the instrument is concerned.

The COURT: The signatures will not be considered a part of the offer, but the document embodies the language of the draft agreement that accompanies this report.

Q. It embodies the terms, the offer which was submitted by Allen & Company?

A. As near as I can remember.

Marked Exhibit D-3.

Q. Upon the reading of this report did any of the creditors signify their intention of accepting?

A. They did.

Q. Some of them at that time said that they would accept, did they not?

A. They did.

Q. And some said they did accept?

A. They did.

Q. About how many in number?

A. Oh, I couldn't tell how many.

15 Q. After the meeting of the 29th did you report to the Allegheny Company what had been done at the meetings?

A. Yes, sir, I did.

The COURT: This report was on the 29th, was it?

Mr. DEPUE: Yes, sir.

Q. A full detailed report of all that occurred?

A. Yes, at both meetings, the 28th and 29th I reported what occurred and the condition of I. N. E. Allen & Company.

Q. Did you report to them that you were chairman of the meeting?

A. I did.

Q. Did you report to them that you were a member of the committee?

A. I did.

Q. And that you examined the books?

A. I did.

Q. And the conclusion which you had reached?

Mr. GORDON: I think he should ask what he reported, this is his witness.

The COURT: You are right.

Mr. DEPUE: Very well, I will ask Mr. Spaulding what he reported.

The COURT: You need not go over the ground that has been covered without objection.

Q. Besides what I have spoken of will you tell us what you reported to the Allegheny Company?

A. I told them the facts in regard to I. N. E. Allen & Company's condition, and that I was at the meeting and that others were there, some had accepted and some had not and gave them a detailed account.

Q. Did you in giving the detailed account refer to the real estate owned by the firm?

A. Not at that time I did not.

Q. That was referred to at the meeting was it not?

A. There was a scale of assets and liabilities that was passed around among all the creditors, and that item of real estate,
16 Newark house was the expression I think on the list.

Q. There was no other real estate owned by this company?

A. Not to my knowledge, I don't think there was.

Q. Now going back to this report, did you report to the Allegheny Company that the committee had signed and made this report?

A. I did.

Q. Did the Allegheny Company ever make any objection to what you had done in that connection?

A. Not to me.

Q. Did you send to the Allegheny Company a copy of the report of the committee?

A. I did not.

Q. Did you send them a copy of the trust agreement?

A. No, I think that was sent from the office; I never sent them one myself. I don't think I had any. It was read at the meeting, but I don't think there were any other copies to send.

Q. Let me refresh your recollection. Didn't Colonel Bacon hand you a copy of that trust deed to send to the Allegheny Company?

A. Not to my knowledge.
Q. Did you know whether in fact they received a copy?
A. I don't know.
Q. Did you report to the Allegheny Company that Allen & Company owned this Newark real estate?
A. Not in that report I did, I told them that this property was owned by them.
Q. Didn't Mr. Allen give you a copy of this trust deed in your office in New York at the time this report was presented for signature?
A. I don't remember.
Q. You made the affidavit on which the attachment was issued, did you not?
A. I did.
Q. And who retained Mr. Gordon to issue the attachment?
A. I did.
Q. For the Allegheny Company of course?
17 A. Yes, sir, under instructions from the Allegheny Company.

Cross examination by Mr. GORDON:

The COURT: Let me ask a question first.

(By the COURT:)

Q. Who is H. C. McKensie whose name is signed to this telegram, Exhibit D–1?
A. He is now secretary of the Allegheny Company.

(By the COURT:)

Q. What was his position in December 1900?
A. I don't know what his position was then, your honor.

Mr. GORDON: He was secretary at that time.
The COURT: Is that admitted?
Mr. GORDON: Oh, I admit that.
The COURT: Proceed.

Q. You reported to the Allegheny Company by telegram, did you or not, or in what manner, what occurred on the meeting of the 28th?
A. My recollection is that I wrote them that evening, which arrived there the next morning.
Q. I show you a telegram dated December 29, 1900, and ask you whether you received that from the Allegheny Company?
A. I did, yes.
Q. On the day it bears date?
A. Yes sir.
Q. Prior to the meeting of the 29th?
A. Yes, a few moments before the meeting.
Q. That refers to this matter, does it?
A. It does.

Counsel for the plaintiff offers the telegram in evidence.
Received and marked Exhibit P–2.
Counsel for plaintiff reads telegram.

Q. I show you a letter dated December 29 from the Allegheny Company, and ask you whether you received that letter from them?
A. I did.

Counsel for plaintiff offers the letter in evidence.
Received and marked Exhibit P–3.
Counsel for plaintiff reads letter.

18 Q. I show you a letter dated January 2nd, 1900, from the Allegheny Company, and ask you whether you received that letter?
A. I received that.

Counsel for plaintiff offers the letter in evidence.
Received and marked Exhibit P–4.
Counsel for plaintiff reads letter.

Q. This referred to accounts that were owing from these people to I. N. E. Allen & Company?
A. That is correct.
Q. I show you a letter dated January 3rd, 1901, from the Allegheny Company, and ask you whether that was received by you?
A. I received that letter from the Allegheny Company.

Counsel for plaintiff offers the letter in evidence.
Received and marked Exhibit P–5.
Counsel for plaintiff reads letter.

Q. That refers to the Newark house that was owned by I. N. E. Allen & Company, in their name?
A. It does.
Q. At the meeting of creditors on the 28th or 29th of December 1900, at the office of I. N. E. Allen & Company—I believe that was where the meetings were held?
A. Nassau street, yes.
Q. Was anything said regarding your authority to represent the Allegheny Company by anybody, and if so, what?
A. No one asked me anything about my authority, and I never stated anything what my instructions were.
Q. Did you state anything about your having authority to accept a settlement?
A. I stated that I had no authority to accept; when the names were called, and they were asked to respond, my response was "I have no authority to accept this settlement, this offer."
Q. That is after you had made your report, there was an oral call was there of the creditors to see who would accept, and who would not; is that the idea?

19 A. That is the idea.

Q. And at that time they called the name of the Allegheny Company?

A. Yes.

Q. In response to that call you stated what?

A. That I had no authority to accept the offer, accept the 20 per cent., their proposition.

Q. Did you speak to Mr. Allen or Mr. Bacon or their attorney—they had an attorney there representing them, did they?

A. Yes sir.

Q. Who was he? Do you see him here?

A. This gentleman right here (indicating) Mr. Janes.

Q. Did you state at any other time either to Mr. Janes or to Mr. Bacon or Allen anything about your authority, or whether you had authority, or whether you accepted for Allen & Company?

A. At one time in the meeting Mr. Janes read a list of those that he said had not refused to accept this proposition and he included the name of the Allegheny Company. I called his attention to it, and I said that he must understand that I had no authority to accept.

Q. That was at the meeting of the 29th, was it?

A. I think it was

Q. In signing that report, the report that has been offered in evidence, did you sign that by authority, or as a representative of, the Allegheny Company, in any way?

Counsel for defendants objects to the question.

The COURT: That must speak for itself; it does not purport to be by their authority in the signature, and if he had no authority to sign representing them, why of course his own personal signature goes for nothing. They have to prove authority. You do not need to prove absence of it. I overrule that question.

Q. You came and retained me after receiving the letter of
20 January 2nd, did you?

A. My instructions were to see an attorney—(interrupted)

Q. The letter shows your instructions; you did see me that day or the day after?

A. The only point—it says, "See an attorney in Hoboken;" I called on a party in Hoboken; he said, "I can't do it for you," and referred me to Mr. Gordon.

Q. Do you remember which day it was?

A. The 4th of January I think was the day that I called on you.

Q. You made the affidavit on the attachment then?

A. I did.

Redirect examination by Mr. DEPUE:

Q. Were there as many creditors present or represented on the 29th of December as there were on the 28th?
A. I don't think there was as many as there was the first day.
Q. The meeting was a great deal smaller, was it not?
A. Yes.
Q. Are you quite sure that that written report was presented at that time?

The COURT: At what time?
Mr. DEPUE: On the 29th.

A. It must have been because I couldn't have made the report before I made the examination of the books.
Q. Wasn't the written report signed after the meeting of the 29th?
A. That was the last day—my impression is that it was signed before it was presented, before that meeting.
Q. Isn't it the fact that at that meeting you made a verbal report and that the written report was signed later?
A. No, my impression is that that was signed and read at the meeting of the 29th.

21 Counsel for defendants offers in evidence a certified copy of the affidavit, and the writ of attachment and the return.
Received and marked Exhibit D–4.

ALEXANDER S. BACON.

Direct examination resumed by Mr. DEPUE:

Q. Will you give us in your own way an account of what took place at that meeting, the meeting of December 28th?

Counsel for plaintiff objects to the question on the ground that they have not proven authority.
Mr. DEPUE: I should like to offer some further evidence on that point.

Q. You were present I think you said at the meeting of December 29, 1900?
A. I was.
Q. You heard what Mr. Spaulding testified to as to his statement as to authority?
A. I did.
—. Was any such statement made by him at that meeting?

Mr. GORDON: Objected to as incompetent. They put Mr. Spaulding on the stand as their witness for the purpose of proving his authority as against us.
The COURT: I admit the question.
To which ruling plaintiff prays an exception.

A. He did not state that he had no authority. He stated that he was there under authority of the Allegheny Company to represent them.

The COURT: That last part will be struck out at present. You are only asked if he stated what he said he stated.

Q. Did he make any statement whatever about his authority?
A. On the first day he stated that he was there representing——

Counsel for plaintiff objects.

22 Mr. DEPUE: I withdraw that question as to the first day. He has already testified what he stated on the first day.

Q. Did he make any statement on the second day as to his authority?
A. No, sir, he did not.
Q. Do you know when this report of the committee was signed by Mr. Spaulding?
A. I know that it was not signed on that day. A verbal report was made on that day. I myself dictated the report of the committee and had that present for that meeting; I have that report as dictated by me here in my possession.
Q. Was that report ever signed?
A. It was not. This report was signed after the 29th.
Q. Did Mr. Spaulding make a verbal report at the meeting of the 29th?
A. In so far as he coincided with what Mr. McKelvey, the chairman, stated.

Counsel for plaintiff moves to strike out the answer.

The COURT: Let it be struck out. That does not give any facts, that is only your conclusion.

Q. Who made the oral report of the committee on the second day?
A. Mr. McKelvey.
Q. The chairman of the committee?
A. Yes, sir. And a resolution was passed thereon which was put by Mr. Spaulding and declared unanimously adopted.

Mr. GORDON: I move to strike that out also as not competent.

Mr. DEPUE: I think we have gone far enough to be entitled to show what was done by Mr. Spaulding at these meetings.

The COURT: I want to get all your testimony on authority first.

23 Mr. DEPUE: I think we are entitled to prove all that he did at these meetings on the question of authoruty.

The COURT: What I am striking out this testimony for is that it is not competent, and attempts to give the contents of a resolution that was passed without showing any minutes or anything of that sort. He does not state what the resolution was. Let that be struck out.

Q. Was this resolution in writing?
A. It was not.
Q. What was the resolution?

Counsel for plaintiff objects to the question.
The COURT: That is proposed to be offered with a view to proving agency?
Mr. DEPUE: Yes, sir.
Counsel for defendants addressed the court.
The COURT: It seems to me doubtful whether it can possibly be evidence on that point, but I have determined after what counsel has said to permit you to prove now what was done at that meeting.
Counsel for plaintiff prays an exception.
Question withdrawn.

Q. Will you begin with the first meeting of December 28, and give us in a succinct way what took place there?
A. The meeting was called for 2 o'clock at the office of Allen & Company. About 30 creditors were there and substantially all of the creditors were represented, as some of the creditors represented others. The meeting was called to order. Mr. Spaulding was elected chairman and a Mr. Turner, who is now dead was elected secretary. The names of all the creditors were taken, and if my memory serves me well the amounts of the respective claims, and it was found that substantially every one was there either in person or by proxy. Mr. Spaulding then called upon me for a state-
24 ment. I made a long statement which took in the history of Allen & Company, and my connection with it, my nominal connection only for several years past—(interrupted)

Mr. GORDON: I move to strike that out, if the court please.
The COURT: I do not see what that has to do with it. You were legally responsible. Strike it out.

A. (Continuing:) And I told them there was some doubt about my being legally responsible.

Mr. GORDON: I object to that and move that it be struck out.
The COURT: I will let that stand.
Counsel for plaintiff prays an exception.

A. (Continuing:) That I was not willing to admit that I was responsible but that I might be up to a certain date in September 1900, but certainly not after that date. A statement of the assets and liabilities was then handed around, one for each creditor, and that statement showed that there were some six or eight thousand dollars in nominal assets, and about forty thousand dollars in debts exclusive of accommodation paper. I told them—(interrupted)

(By the COURT:)

Q. When you speak of nominal assets you mean the assets of the firm?

A. The assets of the firm.
Q. You did not include your individual property?
A. I did not.

(By the COURT:)

Q. Nor Mr. Allen's, if any?
A. Yes, it included Mr. Allen's. Mr. Allen had no individual property except this house.

(By the COURT:)

Q. That was individual was it?
A. That was in his individual name.

(By the COURT:)

Q. Although it belonged to the firm?
25 A. In equity, yes to this extent that several years before —(interrupted)

(By the COURT:)

Q. Oh, never mind.
A. (Continuing:) Mr. Allen had taken possession of the firm assets and treated them all as his own, and this house had been taken in his own name on that account, and he had put in this list of assets of the firm this house.
Q. Had the firm any other real estate assets except this?
A. The firm had no real estate whatever, and this house which in good morals belonged to the firm was put into the assets as a firm asset.
Q. And it was the only piece of real estate among the firm assets?
A. It was the only piece of real estate among the firm assets and it was so stated at the meeting.
Q. After this statement had been made what was done?
A. After this statement had been made I stated to them that the actual assets would not probably be more than about seven per cent. as had just been told me by Mr. Pierce the bookkeeper,—they were nominally seventeen per cent.; that I had heretofore offered 15 per cent. and that we had not received replies but from a very few creditors; I would increase that to twenty per cent. provided they would give plenty of time and I made the offer of 20 cents, 5 per cent. cash, 15 per cent. in three notes for two, four and six months, or longer, I have forgotten exactly about that—to be properly endorsed. We then took the sense of the meeting as to whether or not they would accept this proposition. There were only two or three, perhaps only one that accepted it. They immediately appointed a committee to examine the accounts of Allen & Company, go through their books, and to verify the statements that had been made. This committee was made at my request. Mr. Spaulding was requested to name the committee but he declined. Thereupon

the committee was appointed by the creditors, Mr. McKel-
26 vey president, Mr. Spaulding, and Mr. Schumacher. They were to report next morning at eleven o'clock, and determine whether or not they would recommend to the creditors the acceptance of this sum. In the meantime they stated that it was only just that we should hold ourselves in readiness—(interrupted)

(By Mr. GORDON:)

Q. Who stated that?

A. It was stated in open meeting; I am not certain who said that.

Counsel for plaintiff objects to that.

A. (Continuing:) It was in the hearing of Mr. Spaulding.

Q. Stated by some of the creditors or representatives?

A. By some creditor—that we should hold ourselves in readiness to go into bankruptcy in the event of any creditor trying to obtain a preference. And I stated of course we would do that. That is the substance of everything that happened at the first meeting.

Q. That meeting adjourned until the following day?

A. Until the following day.

Q. Were you present at the second meeting?

A. I was. There were about 8 or 10 creditors there, no more. This committee made a verbal report and that report was to the effect that they had examined the books, they found them as stated—(interrupted)

Mr. GORDON: I object to "was to the effect," as a conclusion.

Q. What was the report?

A. It was substantially—of course I can't remember the exact words—(interrupted).

Q. Give us the substance of it?

A. The substance of it was that they had examined the books, that they had spent until late in the evening, and had been there early that morning; that they had gone through all the accounts; that the statement as given by the bookkeeper was correct; and they recommended to the creditors that the offer be accepted.
27 They stated that the assets were such that they could not be realized upon for some time; that most of them were not good; that if bankruptcy proceedings were had probably nothing would be obtained.; and therefore they urgently recommended this course. This was recommended by a majority only, Mr. McKelvey and Mr. Spaulding. Mr. Schumacher stated that he was not willing to make a report as he represented several creditors, and he didn't know what they might want to do. Thereupon a formal resolution was offered and put by Mr. Spaulding who declared it unanimously adopted; no one voted against it.

The resolution was in substance as follows: Resolved:—That we recommend to the creditors that they accept twenty cents on a dol-

lar, five cents cash, fifteen cents in notes to be endorsed by good endorsers, upon the express condition that Allen & Company put themselves in the hands of their creditors, and consent to go into bankruptcy if any creditor attempts to get a preference.

That resolution was adopted and Mr. Allen and myself stated in open meeting that we were in the hands of the creditors and if any one attempted to get a preference we would immediately go into voluntary bankruptcy. A large part of the time in the two meetings was taken up with certain interests in North Carolina, owned by Mr. Allen individually. I was mistaken before in saying he had no assets except this real estate. He had nominal stock in a company in North Carolina, a lumber company down there, that he had been operating without my knowledge and where a great deal of Allen & Company's assets had gone—this was the cause of the trouble—those assets consisted of stock and were of no value, the company has gone into bankruptcy.

28 (By the COURT:)

Q. You mean stock in a corporation?

A. Yes sir.

Q. After the meeting adjourned was the report of the committee reduced to typewriting?

A. Is this the 29th?

Q. Yes, this is the 29th we are speaking of?

A. I don't think it was.

Q. After the meeting?

A. Oh, after the meeting? Yes, but not that day.

(By the COURT:)

Q. Is that this paper that was drawn up later?

A. I don't think that was drawn up on the same day.

(By the COURT:)

Q. So it never was submitted to a meeting in session?

A. No, sir.

(By the COURT:)

Q. Nor the other paper, the deed of trust?

A. That was drawn up afterwards.

(By the COURT:)

Q. All that happened at the meeting then was oral?

A. Was oral. That trust agreement was drawn up and signed on the 31st.

Q. Do you know when the report was drawn up and signed?

A. Well, I am not certain of that but it may have been on the 31st, the same day, or it may have been later.

Q. Do you know the signatures, or were you present when that trust deed was signed by any one?

A. I was present when Allen & Company, Mr. Allen, Alexander S. Bacon, William Oppenheim signed it. I know their signatures and the signatures here are genuine. I don't know the signature of Mr. Alexander.

(By the COURT:)

Q. When were the names that you did see, signed?

A. I think it was on the date of the instrument, the 31st; I know it was because it was acknowledged that day.

Q. After the report and trust deed had been signed what was done about circulating them among the creditors?

29 A. We made 40 or 50 copies with all of the signatures down to and including that of Mr. Perry, in typewriting, and we made as many copies of the letter already in evidence signed by McKelvey and Spaulding.

Q. By letter you mean the report?

A. The report, yes sir. We sent a copy of these to each creditor, and a large number of them were returned signed, that is, one creditor would sign one trust deed.

Mr. GORDON: You can't prove signatures that way.

Q. Have you the copies of the trust deeds which were sent out and returned with signatures of creditors upon them?

A. I have some of them here in this bundle.

Q. And is there the signature of the creditor to the original?

A. Each one. The Parmele Eckleson Company whose name purports to be signed there were the largest creditors, and we owed them one half of the entire indebtedness.

Q. Was any other effort made by yourself, or your firm to induce creditors to accept this offer except the sending out of copies of the trust deed, and of the committee's report?

A. I have never seen any creditor, I have never known of any efforts being made to effect a settlement except through sending these out through the mails, with the exception possibly of two or three cases which were sued and settled in that way.

Q. Were there other creditors than those whose names purport to be signed to copies of the trust deed, who accepted this offer?

Mr. GORDON: Objected to because they can't prove an acceptance in this way.

Mr. DEPUE: Why can't we show that other creditors accepted that by parol and the acceptance was carried out by them?

The COURT: You want to show that there were other

30 creditors who were settled with on the same basis who did not sign the paper?

Mr. DEPUE: Yes, sir. They did not formally sign the paper, but they accepted it in one way or another, and received the benefits. We are not attempting to show that the plaintiff did that, but we want to show that other creditors did.

It will show the extent to which the creditors acted on the strength of this report of this committee.

The COURT: I will allow you to prove it.

To which ruling plaintiff prays an exception.

(By the COURT:)

Q. Did other creditors accept the settlement who did not sign the paper?

A. Substantially all of them did, all but four or five or six.

Q. Out of the forty?

A. Out of the forty, and they were small excepting one or two and those are in suit I think now.

Q. Was the five per cent. cash paid to the creditors who accepted the offer at the foot of copies of the deed or any other way?

A. It was.

Q. And were notes for the remaining 15 per cent. endorsed by Mr. Oppenheim and given to them?

A. There were.

Q. And do you know whether those notes were paid upon their maturity?

A. They were all paid.

Q. So that as to creditors who accepted, the arrangement has been fully carried out?

A. Yes, sir.

Cross-examination by Mr. GORDON:

Q. You are a lawyer practicing law in New York city, are you?

A. I am.

Q. Have been practicing law there how long?

A. Since 1881.

Q. You drew the report that you afterwards had signed by the committee?

A. I did not.

Q. Didn't you?

A. No, sir.

31 Q. I understood you to so testify?

A. I dictated a report and had it there for signature, but it was not accepted.

(By the COURT:)

Q. Who drew up this one that was signed?

A. They did themselves so far as I know.

Q. The committee?

A. Yes, sir.

Q. Who drew the trust agreement?

A. That was drawn between Mr. McKelvey and myself, I think.

Q. When, do you know?

A. About the day of its date, I think.

Q. About the 31st?

A. The 31st.

Q. Then the committee could not as a committee when they reported on the 29th have had that agreement before them, although their report refers to it?

A. They did not, no, sir, that trust agreement was not present on the 29th.

Q. At the meeting of the creditors you say there was a statement of the assets of the firm made?

A. Yes, sir.

Q. And given to the committee?

A. Yes, sir.

Q. And that that statement did not include any of your personal assets?

A. No sir.

Q. You had personal assets which were not stated, had you?

A. It didn't pretend to give any personal assets.

Q. There wasn't anything said at that meeting regarding your personal assets?

A. Something was I think.

Q. Do you remember anything that was said by anybody at that meeting regarding your personal assets?

A. I do not, no.

Q. Do you remember whether anybody asked whether you had any personal assets?

A. I do.

Q. Who asked?

A. Mr. McKelvey.

Q. What was said?

A. He asked if I had any real estate, and I told him no except an interest, a small interest in my father's estate out in Michigan.

32 Q. Did he ask anything else?

A. That was substantially all. I don't remember anything else.

Q. Who heard that?

A. Everybody.

Q. It was in the open meeting when all were present?

A. Yes sir.

Q. On the 28th or 29th?

A. 28th.

Q. Didn't they ask you about any other assets except real estate?

A. No, sir.

Q. You didn't state that was all the assets you had?

A. I did not.

Q. And these creditors to whom you and Allen were both liable came there to make a settlement and they asked you nothing more than you stated about your personal assets?

A. Yes, sir.

Q. You admit there was no question about your liability since September, 1900?

A. I did not.

Q. Didn't you on your direct examination state that?

A. No, I told them that as to my liability before September there was some doubt, but after that I claimed I wasn't liable, and that there was doubt about it before.

Q. You did have personal assets?

A. Some, our homestead where we live is in my wife's name.

Q. You stated that Mr. Spaulding did not state at the meetings of the creditors that he did not have authority to accept this proposition for the Allegheny Company?

A. Yes.

Q. You mean by that that you have no memory of his stating that?

A. No, I stated that he did not; I didn't say that I have no memory.

Q. It couldn't have been said without your remembering it?

A. No.

Q. You remember everything that was stated there?

A. Yes, substantially.

Q. So that there couldn't be any doubt about that?

33 A. Yes, because I read over the minutes just a little while ago.

Q. Why did you go over the minutes?

A. To refresh my memory.

Q. How did the minutes refresh your memory on that subject?

A. Because the minutes purport to have taken in everything the stenographer's minutes.

Q. Then you didn't have memory of all that occurred except by refreshing your memory from the minutes?

A. Certainly, best possible way.

Q. Do the minutes say anything about Spaulding or anybody else having accepted the proposition?

A. No.

Q. How could they refresh your memory on the subject as to what was said about acceptance when the minutes don't show anything about who accepted or refused to accept?

A. I am speaking of the stenographer's minutes; my stenographer was there.

Q. Did the minutes show that?

A. Show what?

Q. Anything as to who accepted or who refused to accept the proposition of settlement?

A. The minutes stated what was said by each person.

Q. Have you those minutes here?

A. Only a part of them.

Q. Did those minutes state anywhere in them who accepted or who refused to accept the proposition of settlement?

A. I don't think they do.

Q. Well then how could you refresh your memory as to what Mr. Spaulding said about the acceptance of the proposition of settlement when the minutes did not refer to what anybody said on that subject?

A. I haven't the minutes of the first day; those were read to me.

Q. If you hadn't the minutes of the first day how could you refresh your memory by the minutes as to what occurred on the first day?

34 A. By having the stenographer read them to me.

Q. You had him read them to you?

A. Yes.

Q. Did those that he read to you say anything about who accepted or who rejected the proposition of settlement?

A. I think it did. The first day there were some of them accepted.

Q. Are these the minutes you are referring to? Just let me have them?

A. Those are what I dictated for the first day (indicating). I am not referring to these now.

Q. What is there in those minutes to refresh your memory as to that?

A. My memory is refreshed as to everything that happened on the second day by reading this transcript of the minutes of the second day.

Q. So that you know now from memory everything that happened there on the second day, do you?

A. I know everything referred to in the minutes; I don't think anything happened that wasn't.

Q. Was there anything referred to in those minutes about who accepted or who rejected the proposition of settlement?

A. I don't think that it did state who did or who did not.

Q. Do you remember who accepted? You remember everything that occurred that day, give us the names of the parties?

A. I never said I remembered everything that happened that day.

Mr. GORDON: If I remember your testimony within about five minutes I think you did testify to just that thing. Well, that is all, Mr. Bacon.

Redirect examination by Mr. DEPUE:

Q. When did you first hear that this suit had been begun?

A. About four months afterwards, just before it was time—just before it would be too late to go into bankruptcy, and we drew a petition in bankruptcy—it was about three months and a

35 half—we drew a petition in bankruptcy, to go into bankruptcy, to kill this claim.

(By the COURT:)

Q. You didn't do it?
A. We didn't do it because Mr. Janes didn't give us the right date.

Counsel for plaintiff moves to strike out the answer.
The COURT: It may be struck out.

WILLIAM H. JANES, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. DEPUE:

Q. Where do you live?
A. I live at 367 West 23rd street, New York city.
Q. What is your occupation?
A. I am an attorney.
Q. Of the New York bar?
A. Yes.
Q. And practice in New York?
A. Yes.
Q. Did you attend a meeting of the creditors of Allen & Company, December 28, 1900?
A. Yes, sir.
Q. And the adjourned meeting on the following day?
A. Yes.
Q. Did you represent creditors of Allen & Company at those meetings?
A. I represented creditors of Allen & Company, that is, two of them, the Pequosset Lumber Company, and the Pocahontas Lumber Company.
Q. Were you present on the second day when the committee made its report?
A. I was.
Q. Was it oral or written?
A. The report was made as I remember by Mr. McKelvey.
Q. Orally?
A. As I remember orally; he was one of the committee selected at the first meeting.
Q. Did Mr. Spaulding concur in the report?
A. He did.

Mr. GORDON: Objected to as calling for a conclusion—
36 (interrupted)

A. (Continuing:) He was the chairman of the meeting.

Mr. GORDON: And also on the ground that it is incompetent, and on the ground that they have not shown agency.
The COURT: That question I will overrule. It is not properly framed.

Q. What was the report?

Mr. GORDON: Same objection; that is objected to on the ground that they have not proved agency.

The COURT: I am permitting that testimony to go in.

Counsel for plaintiff prays an exception.

A. The report was to the effect that the committee approved the proposition made at the first meeting to accept five per cent. in cash, and fifteen per cent. in endorsed notes of William Oppenheim, who was offered as the endorser, and to take an assignment of the claim of Allen & Company against the North State Lumber Company of North Carolina, to E. M. Perry for the benefit of creditors, and for the transfer of the rest of the assets to Mr. Oppenheim.

Q. Was that report accepted as a report of the committee?

A. Yes.

Q. Mr. Spaulding was present at that time?

A. Yes.

Q. And did Mr. Spaulding say anything about it?

A. I don't recollect now just what Mr. Spaulding said. He was the chairman of the meeting and as I remember offered the resolution for the approval of the report? If I had the minutes, which I have not looked over, to refresh my memory, I might recollect more clearly.

Q. Do you know anything about the signatures of this written report afterwards?

A. Yes, I do.

Q. Do you know when that was signed?

37 A. I think it was signed—(interrupted)

Q. Was it presented signed at the meeting?

A. It was not.

Q. Was this trust deed presented at the meeting, or a draft of it?

A. It was not.

Q. Those were prepared afterwards?

A. They were prepared afterwards.

Q. Did you hear at the second meeting, or at the second meeting, Mr. Spaulding make any statement as to any limitations upon his authority to represent the Allegheny Company?

A. I don't remember any such statement. The meeting was called to order by myself, and I immediately suggested at that time the selection of a chairman, and from that time on almost immediately my duties ceased with respect to the conduct of the meeting, and I had nothing whatever to do with the conduct of the meeting from there on, except to get the names here and there of the different creditors present.

Q. Did your clients afterwards accept this proposition?

A. They accepted, and received their cash and the notes, and the notes were paid.

Q. Do you know whether they accepted upon your advice?

Counsel for the plaintiff objects to the question on the ground that it is immaterial.

The COURT: How can it have any bearing?

Mr. DEPUE: I propose to show that it is the fact that they accepted upon Mr. Janes' advice, and Mr. Janes was induced to give such advice by the report of this committee.

The COURT: The question is illegal for various reasons.

Q. Did you give any advice to the creditors you represented as to accepting or rejecting this offer?

38 A. Yes.

Q. Did you advise them to accept or reject it?

A. I advised them to accept it.

Q. Why did you give them that advice?

A. Because I thought it was a more favorable proposition, or more favorable proposition than they could possibly get in bankruptcy or in any other way.

Q. What led you to that conclusion?

Counsel for plaintiff objects to the question on the ground that it is immaterial.

A. From the report of Mr. Spaulding.

The COURT: It is a fact that that report was made.

Mr. DEPUE: It is a fact that it was made.

The COURT: That exists in the case. I do not quite see why you need the evidence. Of course he supposed it was a true report of facts and I do not suppose that the recommendation of Mr. Spaulding as an individual had anything to do with it.

Mr. DEPUE: If he was there as an individual that is quite a different proposition.

The COURT: His opinion must be an individual opinion.

Mr. DEPUE: It is the opinion of the representative of a corporation. It seemed to me we were entitled to go further and show, if we desired, that creditors acted on the faith of this report made by the man who came to the meeting representing the company.

The COURT: It wasn't made until afterwards. Mr. McKelvey orally said something in the meeting, and Mr. Spaulding sat by and said nothing.

You want to know whether he was influenced in his advice to these clients of his to take this settlement by that report. I will permit you to ask it, and give the other side an exception.

39 A. I was influenced by Mr. Spaulding's report.

(By the COURT:)

Q. Committee's report you mean?

A. By the committee's report and by statements made to me by Mr. Spaulding.

The COURT: That you do not want. You have to prove the statements.

Mr. DEPUE: Strike it out.

Q. Were you present at the first meeting when the roll call of creditors was had?

A. I was.

Q. Did you hear Mr. Spaulding answer for the Allegheny Company?

A. I heard some one answer for the Allegheny Company, I didn't know Mr. Spaulding at that time.

Q. You knew him afterwards?

A. Of course I became acquainted with him, and I saw him frequently from day to day at the office of Allen & Company examining the books.

Q. Did you see him on the day following the first meeting of the 28th?

A. Undoubtedly if he was there, because I was there all the time.

Q. Did you know he was representing the Allegheny Company?

Mr. GORDON: Oh, this—(interrupted)

A. I did.

Mr. GORDON (continuing): —is immaterial.

(By the COURT:)

Q. Do you know that he professed to represent the Allegheny Company?

A. Yes. I remember distinctly asking him if he approved of this settlement and he said he did.

Q. Did you have any conversation with Mr. Spaulding about his authority?

Counsel for plaintiff objects to the question on the ground that it is immaterial.

A. I would like just a moment to recollect. I can't remember of any particular questions or answers.

Cross-examination by Mr. GORDON:

Q. You are an attorney at law you say?

A. Yes sir.

Q. Practicing in New York city, and attorney for Allen and Bacon?

A. I was the attorney for the company, not the individual attorney of Colonel Bacon.

Q. But of the company of I. N. E. Allen & Company?

A. Yes.

(By the COURT:)

Q. You were at this time?

A. Yes, sir.

Q. And you were at the time of this meeting?
A. Yes, sir.
Q. And you attended that meeting as their attorney?
A. Yes.
Q. And you made a number of remarks or addresses to the creditors as their attorney regarding their affairs?
A. Not a number of remarks; I simply called the meeting to order.
Q. Didn't you make an argument or address to the creditors regarding the affairs of I. N. E. Allen & Company?
A. Yes.
Q. You represented some of the other creditors also?
A. I had two clients whom I represented, and also represented Allen & Company.
Q. What were the amounts of the claims of the two creditors that you represented?
A. Well, let's see, the Pocohontas Lumber Company was in the neighborhood of a thousand to twelve hundred dollars.
Q. And the other?
A. In the neighborhood of $370.
Q. You attended that meeting in both capacities representing both the creditors and the other people?
A. Yes.
Q. And representing your clients you made no inquiry as to Colonel Bacon's personal property or assets?
A. Yes, I did.
Q. There in the meeting?
A. Not at that particular meeting.
41 Q. When did you?
A. Within a week.
Q. Representing your clients who were creditors appearing there at that meeting for people who owed your clients money, you never there before all those creditors tried to ascertain for their benefit anything regarding the personal responsibility of one of the partners; is that so?

Counsel for defendants objects to the question as not cross examination, and immaterial.

The COURT: I presume it is cross-examination as to whether he was influenced in advising his clients.

Mr. DEPUE: Well, possibly it is cross-examination on that.

A. Not at that particular moment I did not.
Q. You did not until several days afterwards?
A. Not until afterwards.
Q. After these meetings had been held you acted for I. N. E. Allen & Company as their attorney in endeavoring to procure signatures to this agreement, did you not?
A. Yes, sir.

Q. And you communicated with me to endeavor to get the Allegheny Company to come in, did you not?
A. Yes.
Q. I show you a letter dated May 2nd, 1900, to the Allegheny Company; that was written by you as attorney for Allen & Company?
A. Yes.

Said letter is marked Exhibit P–6 for identification.

Redirect examination by Mr. DEPUE:

Q. I show you a letter; did you receive that letter from Mr. Gordon?
A. Yes.

Said letter is marked Exhibit D–4 for identification.

Recross examination by Mr. GORDON:

Q. You offered me prior to the receipt of that letter 50 per cent. in settlement of the Allegheny claim, did you not?
42 A. Yes, sir, I did.

ISAAC N. E. ALLEN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. DEPUE:

Q. Where do you live?
A. New York city.
Q. Are you one of the defendants in this suit?
A. Yes.
Q. And were a member of the firm of Isaac N. E. Allen & Company?
A. Yes, sir.
Q. Were you present at the meetings of the creditors on December 28th and 29th?
A. Yes, sir.
Q. Do you remember seeing Mr. Spaulding there?
A. Yes, sir.
Q. Did he say anything to you or in your presence as to any limitations upon his authority to represent the Allegheny Company?
A. At those meetings?
Q. Yes.
A. No, sir.
Q. When did you first hear of the issuing of this attachment?
A. Well, it was some time after the attachment, I don't remember, some time afterwards.
Q. Was the written report of the committee presented at the meeting of December 29, or was it signed later?

A. It was signed later.

Q. Did the committee make an oral report at the meeting on the second day?

A. Yes, sir.

Q. And what was that report?

A. That report was a recommendation of the settlement which was afterwards carried out.

Q. And the written report and the trust deed were prepared after the meeting?

A. Yes sir.

Q. And sent to the various creditors?

A. Yes, sir.

Q. And was the sending of the trust deed, and the copies
43 of the committee's report the only effort that was made to induce creditors to accept settlement?

A. In two or three cases I wrote personal letters, I think two creditors that I had done business with a long time, requesting them to accept the settlement.

Q. Outside of that was there anything done?

A. No, sir.

Q. You say that it was some time after the attachment was issued that you learned of it; can you say about how long?

A. Oh, I would say from a week to a month. The attorneys had the matter in charge and I wasn't paying particular attention to that.

Q. After you heard of it do you know whether or not any petition in bankruptcy was prepared for yourself and Colonel Bacon to sign?

Counsel for plaintiff objects to the question on the ground that it is immaterial.

Mr. DEPUE: I propose to show part of the understanding was that the firm should go into bankruptcy in case any creditor attempted to get a preference; now I propose to show that the firm did not learn of this attachment until four months, or nearly four months after it was issued, and that papers were prepared to go into bankruptcy pursuant to this understanding, but that before they were executed it was found that the time had expired. It has this bearing that that was the understanding in the open meeting, part of the resolution accepting the report of this committee, part of this agreement, the proceedings were so conducted; that that arrangement was made ineffective; in other words, that these people who held out recommended this settlement and not only tried to get
better terms but they attempted to get a preference in this
44 way, and they attempted to get it under such circumstances as to make ineffective that part of the arrangement which provided for bankruptcy proceedings in case of any attempt to get a preference.

The COURT: I overrule the question.

To which ruling the defendants pray that an exception may be allowed, and it is allowed, and signed and sealed accordingly.

GILBERT COLLINS, *J. S. C.* [SEAL.]

Q. Who told you of the issuing of the writ of attachment?
A. Mr. Janes I think.

WILLIAM H. JANES, recalled as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. DEPUE:

Q. When did you tell Mr. Allen of the issuing of this writ of attachment?
A. It was within probably about two weeks prior to the time that the four months would have run against the attachment.
Q. It was four months from the date of the issuing of the writ less two weeks?
A. About three, a little over three months.
Q. Were steps then taken towards bankruptcy proceedings by the firm of Allen & Company?

Counsel for plaintiff objects to the question.
The COURT: How is this question relevant?
Mr. DEPUE: I submit that the question is relevant in this aspect, that it shows that not only did the plaintiff after the recommendation of the acceptance of this proposition attempt to gain a preference by the attachment suit, but that the proceedings in the
45 attachment suit were so conducted that the defendants did not learn of them in time to take effective steps to defeat a preference by bankruptcy proceedings pursuant to the understanding which was had at the meeting of creditors at which the representative of the plaintiff was present and pursuant to what I referred to as a term of this trust deed.
The COURT: I overrule the question.
To which ruling defendants pray that an exception may be allowed, and it is allowed, and signed and sealed accordingly.

GILBERT COLLINS, *J. S. C.* [SEAL.]

Recess to 2 p. m.

After recess.

Redirect examination of WILLIAM H. JANES resumed by Mr. DEPUE:

Q. I show you the original trust deed, Exhibit D-3, was that signed by Mr. Perry in your presence?
A. Yes, sir.

Mr. DEPUE: I believe the signatures are not in evidence. I now offer the whole agreement with the signatures.

Counsel for plaintiff objects on the ground that the execution is not properly proved.

The COURT: I will admit it on the ground that it is evidential, as to those whose signatures are proved without ruling as to whether it is proved as to the Parmele Eckleson Company. I do not hold it is proved as to them.

46 ISAAC N. E. ALLEN, recalled as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. DEPUE:

Q. I show you what purports to be a copy of this trust deed, purporting to be signed by Mr. H. C. Magruder; did you present that copy to Mr. Magruder for signature?

A. Yes, sir.

Q. Did he sign it at that time?

A. Yes, sir.

Q. Did he sign it in your presence?

A. Yes, sir. At least I won't say whether it was in my presence. I was in the office at the time. I know his signature any way, and that is his true signature.

Q. I show you what purports to be another copy of that trust deed signed by Mr. Lynch; do you know his signature?

A. I do.

Q. Is that his true signature to that?

A. Yes, sir.

Q. I show you the original of this trust deed, and ask you if you know the signature of the Parmele Eckleson Lumber Company by Mr. Alexander?

A. That was signed in my presence.

Mr. GORDON: He has not shown any authority by Alexander to sign it.

Q. Do you know Mr. Alexander?

A. I do.

Q. Do you know he acted as president of that company?

A. I know he acted as president.

Agreement offered in evidence.

Counsel for plaintiff objects to it as not properly proved.

Received as marked.

Plaintiff prays an exception.

Mr. DEPUE: I offer in evidence these copies signed by Mr. Lynch and Mr. Magruder.

Mr. GORDON: I object to their admission on the ground
47 that they are incompetent and immaterial.

The COURT: I admit them.

Said papers are marked respectively Exhibit D–5 and D–6.

Counsel for plaintiff prays an exception.

Mr. DEPUE: I will offer in evidence copies of this trust deed purporting to be signed by McNaughton & Hall; H. S. Robinson; Carolina Lumber Company; C. F. Harmes; Leory Tunis & Co.; Hilton & Dodge Lumber Company; the Bridges and McKethan Lumber Company; the Nottingham & Rhenne Company; J. C. Turner Cypress Lumber Company; I. Hernstadt. These were copies produced by Colonel Bacon on his examination, which were received by him purporting to be signed by creditors.

Mr. GORDON: I object to their admission on the ground that they are immaterial, and the execution has not been proven.

The COURT: I exclude them on the ground that their execution has not been proven.

Defendant rests.

Mr. GORDON: I wish to move for the direction of a verdict in favor of the plaintiff for the whole amount

First. Because they have proven no power or authority on Mr. Spaulding's part to bind the Allegheny Company they have proven an agency and they are bound by it. The only proof in the case is
48 that he was a special agent, was not in their employ at all until employed by the telegram which is in evidence, which requests him to attend a meeting of the creditors and report.

Second. That they have not proven that Spaulding purported to, or did accept for the Allegheny Company this proposition, or any action on his part, which, if he were their agent with authority to act, would have bound them to an acceptance of this proposition, and they don't claim to have proven that as I understand it.

Third. That there is no proof in the case that Spaulding, if he had authority to bind the Allegheny Company, did anything which would estop the Allegheny Company from pursuing their claim; no fact or circumstance is proven in the case which would act as an estoppel.

Fourth. There is no proof in the case tending to show that Spaulding made any representation to anybody on behalf of the Allegheny Company.

Fifth. Because under the pleadings in the case, they have failed to plead an estoppel and they having failed to give notice of it, although called upon by notice under the general issue, that defense could not be set up; even if there were proof which might refer to it.

Sixth. That they have shown no tender of performance of the agreement, nor performance of it to defeat this action.

Mr. Depue addressed the court.

Mr. DEPUE: Here is a letter I had marked for identification. I neglected to offer it in evidence. It is a letter marked for identification Exhibit D–4. I will offer it now.

There being no objection it is received and marked in evidence.

49 GENTLEMEN OF THE JURY: I do not know of anything that I could submit to you as a question of fact except possibly the dispute of Mr. Spaulding's statement of what he said to some of the other witnesses, and that I do not regard as material.

It is, therefore, purely a legal matter that I must deal with. I have been very careful in watching the case, as it proceeded and have admitted all evidence that I thought by any possibility should be admitted, in order that there might be no omission of anything that might give us light. But as the case has developed it has seemed to me, and the able argument of counsel has not convinced me otherwise, that the defendants have not made out their defense; that the case on the part of the plaintiff has not been overcome.

I therefore, instruct you to find a verdict in favor of the plaintiff for the balance due on its note with interest from October 16, 1900, to November 4, 1902.

The counsel have reckoned the interest and do not disagree as to that. If you agree that that is right, $1,108.64 will be the verdict.

To which ruling defendants pray an exception may be allowed, and it is allowed, and signed and sealed accordingly.

GILBERT COLLINS, *J. S. C.* [SEAL.]

[Endorsed:] New Jersey supreme court. Hudson circuit, Sept. term 1902. The Allegheny Company *vs.* Isaac N. E. Allen and Alexander S. Bacon. Filed February 16, 1903.

50 NEW JERSEY, *ss:*

[SEAL.] The State of New Jersey to the chief justice and other justices of our supreme court of judicature, Greeting:

For as much as in the record and proceedings, as also in the giving of judgment in a certain plaint which was in our said supreme court of judicature before you between The Alleghany Company, plaintiff, and Isaac N. E. Allen and Alexander S. Bacon, partners trading as I. N. E. Allen and Company, in an action upon contract, manifest error hath intervened, to the great damage of the said defendants, as it is said; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, then you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same to our judges of our court of errors and appeals in the last resort in all causes, at Trenton, on the first day of December next, with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and

according to the law and custom of the State of New Jersey ought to be done.

Witness our chancellor and president judge of our said court of errors and appeals at Trenton aforesaid the thirteenth day of November, one thousand nine hundred and two.

S. D. DICKINSON, *Clerk.*

LINDABURY, DEPUE & FAULKS, *Attorneys.*

51 The answer of the justices of the supreme court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the court of errors and appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, *C. J.* [SEAL.]

[Endorsed:] New Jersey court of errors & appeals. The Alleghany Co., def't in error, *vs.* Isaac N. E. Allen, *et als.*, pl't'ffs in error. On error to supreme court. Writ of error. Returnable December 1, 1902. Lindabury, Depue & Faulks, att'ys for pl't'ffs in error Filed November 25, 1903. S. D. Dickinson, clerk.

52 New Jersey Court of Errors and Appeals, June Term, 1903.

Between—

THE ALLEGHANY COMPANY, Defendant in Error, *vs.* ISAAC N. E. ALLEN ET ALS., Plaintiffs in Error.	In Error to Supreme Court. Order on Affirmance of Judgment.

This cause having been duly argued at the March term, 1903, of this court by Sherwood Depue and Alexander S. Bacon of counsel for the plaintiff in error, and James A. Gordon of counsel for the defendant in error, and the court having considered the same, and finding no error in the record or proceedings in the supreme court—

It is thereupon, on this twentieth day of July, in the year of our Lord, one thousand nine hundred and three, ordered and adjudged that the judgment of the supreme court, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the supreme court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

JAMES A. GORDON,
Attorney of Defendant in Error.

53 Department of State.

I, S. D. Dickinson, secretary of state of the State of New Jersey, and *ex officio* clerk of the court of errors and appeals in the last resort in all causes, do hereby certify, that the foregoing is a true copy of an order made by said court in the above stated cause, dated July 20, 1903, as the same is taken from and compared with the minutes of said court.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed my official seal, at Trenton, this 22nd day of July, 1903.

S. D. DICKINSON,
Secretary of State.

[Endorsed:] New Jersey supreme court, June term, 1903. The Alleghany Co., def't in error, *vs.* Isaac N. E. Allen, *et als.*, p'lt'ffs in error. In error to supreme court. Order affirming judgment. James A. Gordon, attorney. Filed August 3, 1903. William Riker, Jr., clerk.

54 New Jersey Supreme Court.

THE ALLEGHANY COMPANY, Defendant in Error, *vs.* ISAAC N. E. ALLEN ET AL., Plaintiffs in Error.	}	In Error. Remittitur.

It appearing by the remittitur now here returned from the court of errors and appeals that the judgment of this court, removed by the writ of error in the above entitled cause, was in and by said court of errors and appeals affirmed with costs;

It is ordered that said remittitur be filed and that said cause be proceeded in according to law.

Entered August 3, 1903, on motion of

JAMES A. GORDON, *Attorney.*

55 I, William Riker, Jr., clerk of the supreme court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause, and also the bill of exceptions, writ of error directed to the court of errors and appeals of said State, the remittitur from said court and also the rule of this court entered upon said remittitur as the same remain on file and of record in my office.

In testimony whereof, I have set my hand and the seal of said court, at Trenton, this twenty-seventh day of August, A. D. nineteen hundred and three.

[Seal of the Supreme Court.]

WM. RIKER, JR., *Clerk.*

56 [Endorsed:] New Jersey supreme court. The Allegheny Company *vs.* Isaac N. E. Allen and Alexander S. Bacon. Copy of judgment, etc. James A. Gordon, attorney. Clerk's office, Trenton.

57 UNITED STATES OF AMERICA, *ss:*

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

The President of the United States of America to the judges of the court of errors and appeals and the supreme court of the State of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, between The Alleghany Company, defendant in error and Isaac N. E. Allen and Alexander S. Bacon, plaintiffs in error a manifest error hath happened, to the great damage of the said plaintiffs in error as is said and appears by their complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washingon, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the ninth day of September 1903, that the record and proceedings aforesaid being inspected the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice
58 of the Supreme Court of the United States, this 11th day of August in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-eighth.

S. D. OLIPHANT,
Clerk of the U. S. Circuit Court, District of New Jersey.

The foregoing writ is hereby allowed.

WM. S. GUMMERE,
Chief Justice Supreme Court State of New Jersey and Presiding Judge of the Court of Errors and Appeals, the Chancellor Being Absent from the State.

59 The answer of the justices of the supreme court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and

concerning the same, we do certify to the Supreme Court of the United States at the city of Washington, in a certain schedule to this writ annexed, including the original petition for writ of error, original assignment of error, original citation and original bond for damages and costs on writ of error, as within we are commanded.

WM. S. GUMMERE, *C. J.* [SEAL.]

60 [Endorsed:] Supreme Court of the United States. The Alleghany Company, defendant in error *vs.* Isaac N. E. Allen & Alexander S. Bacon, plaintiffs in error Original. Writ of error Alexander S. Bacon, attorney for plaintiffs in error 37 Liberty street, borough of Manhattan, New York city.

61 By the Honorable Wm. S. Gummere, chief justice supreme court State of New Jersey and presiding judge of the court of errors and appeals, the chancellor being absent from the State.

To The Alleghany Company, defendant in error, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States to be held at the Capitol in the city of Washington, District of Columbia, on the 7th day of September, 1903, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the District of New Jersey, wherein The Alleghany Company is defendant in error, and Isaac N. E. Allen and Alexander S. Bacon are plaintiffs in error, and you are ordered to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at Newark, State of New Jersey, in the district and circuit above named this tenth day of August, in the year of our Lord one thousand nine hundred and three, and of the Independence of these United States the one hundred and twenty-eighth.

WM. S. GUMMERE,
Chief Justice Supreme Court State of New Jersey and Presiding Judge of the Court of Errors and Appeals, the Chancellor Being Absent from the State.

62 [Endorsed:] 6203 $\frac{73}{21}$ Supreme Court of the United States The Alleghany Company defendant in error, *vs.* Isaac N. E. Allen & Alexander S. Bacon, plaintiffs in error. Original. Citation. Alexander S. Bacon, attorney for plaintiffs in error 37 Liberty street, borough of Manhattan, New York city. Filed Aug. 21 1903 Wm. Riker, Jr., clerk.

63 Petition for writ of error requiring the court of errors and appeals of the State of New Jersey to certify to the Supreme Court of the United States for its review and determination the case of

"THE ALLEGHANY COMPANY, Defendant in Error,
vs.
ISAAC N. E. ALLEN and ALEXANDER S. BACON, Plaintiffs in Error.

To the honorable the Supreme Court of the United States:

The petition of Isaac N. E. Allen and Alexander S. Bacon, plaintiffs in error, respectfully shows to this honorable court as follows:

I. Your petitioners are residents of the State of New York, and the defendant in error is a corporation organized and existing under and by virtue of the laws of the State of North Carolina, and having its principal place for the transaction of business in the city of Scranton, State of Pennsylvania.

II. That the said Alleghany Company began an action by attachment in the State of New Jersey on a promissory note signed by the plaintiffs in error to the order of the defendant in error, dated July 16, 1900, for $1989.54, on which $1000 was paid on account.

III. Plaintiffs in error, for answer to the declaration herein, pleaded (1) the general issue; (2) the statute of the State of New York in relation to foreign corporations doing business therein, without filing the necessary certificate therefor, alleging that the defendant was doing business in the State of New York contrary to law, and that this was a New York transaction and void; (3) the statute of the State of Pennsylvania in relation to foreign corporations doing business therein, without filing the necessary certificate therefor, alleging that the defendant was doing business in the State of Pennsylvania contrary to law, and that this was a Pennsylvania transaction and void; (4) an estoppel in that the defendant in error had been present at a meeting of creditors and had agreed to take 20% of the said claim in settlement. (Reference is made to said answer for a full statement of the issues.)

64

IV. To said defenses marked 2 and 3, the defendant in error demurred, and the court of errors and appeals of the State of New Jersey has sustained said demurrer, rendering final judgment, on grounds that appear fully in the opinion of that court to which reference is hereby made.

Petitioners allege that each defense 2 and 3 of said answer, stands by itself, is separate and distinct, and each allegation thereof is admitted by the demurrer so that no question of fact is involved in this controversy, and if said transaction be void by the said statutes of either New York or Pennsylvania, the petitioners are entitled to a reversal of the judgment.

V. Petitioners allege that under the facts as admitted, the transaction alleged in the declaration was absolutely void under the laws

of the State of New York set forth in the said second defense, and being absolutely void, is not enforceable in the State of New Jersey, by reason of the provisions of §§ 1 and 2, article IV of the Constitution of the United States, and § 905 of the Revised Statutes of the United States, which require, among other things that "full faith "and credit shall be given in each State to the public acts * * * "of every other State;" and if the "public acts" of the State of New York declare that a contract entered into in the State
65 of New York be void, the same is void everywhere, and can not be enforced in a New Jersey court.

VI. Petitioners allege that under the facts as admitted, the transaction alleged in the declaration was absolutely void under the laws of the State of Pennsylvania set forth in the said third defense, and being absolutely void, is not enforceable in the State of New Jersey, by reason of the provisions of §§ 1 and 2, article IV of the Constitution of the United States, and § 905 of the Revised Statutes of the United States, which require, among other things that "full faith and credit shall be given in each State to the public "acts * * * of every other State; and if the "public acts" of the State of Pennsylvania declare that a contract entered into in the State of Pennsylvania be void, the same is void everywhere, and cannot be enforced in a New Jersey court.

VII. Petitioners allege that the courts of the State of New Jersey have, in this action, refused to give "full faith and credit" to the statutes of the States of New York and Pennsylvania, which make the contract set forth in the declaration herein absolutely void, not only in the local forums of Pennsylvania and New York, but in any forum within the United States of America.

Wherefore your petitioners respectfully pray that a writ of error may issue out of and under the seal of this court, directed to the court of errors and appeals of the State of New Jersey, commanding the said court to certify and send to the Supreme Court of the United States on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the said court of errors and appeals and the New Jersey supreme court, in the said case herein entitled "The Alleghany Company *vs.* Isaac N. E. Allen and Alexander S. Bacon" to the end that said case may be reviewed and determined by the Supreme Court of the United States, as
66 provided by law, or that your petitioners may have such other or further relief in the premises as to this court may seem appropriate, and in conformity with law; and that the said judgment of the court of errors and appeals of the State of New Jersey and of the New Jersey supreme court, and of every part thereof, may be reversed by this court and all errors corrected.

And your petitioners will ever pray &c.

ISAAC N. E. ALLEN.
ALEXANDER S. BACON.

STATE OF NEW YORK, }
County of New York, } ss.:

Isaac N. E. Allen and Alexander S. Bacon, being severally, duly sworn, says, each for himself: That he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ISAAC N. E. ALLEN.
ALEXANDER S. BACON.

Sworn to before me this, 5th day of August, 1903.

[Seal of Morton Stein, Notary Public, New York.]

MORTON STEIN,
Notary Public, New York County.

Certificate filed in Kings county.

On this 5th day of August, 1903, in the city and county of New York, before me, a notary public, in and for the city and county of New York, personally appeared Isaac N. E. Allen and Alexander S. Bacon, to me known to be the individuals who executed the foregoing petition, and then and there severally acknowledged to me that they had executed the same.

[Seal of Morton Stein, Notary Public, New York.]

MORTON STEIN,
Notary Public, New York County.

Certificate filed in Kings county.

67 [Endorsed:] 6203 $\frac{731}{21}$ United States Supreme Court The Alleghany Company, defendant in error *vs.* Isaac N. E. Allen & Alexander S. Bacon, plaintiffs in error Original. Petition for writ of error. Aiexander S. Bacon, attorney for plaintiffs in error 37 Liberty street, borough of Manhattan, New York city. Filed Aug. 21 1903 Wm. Riker, Jr., clerk.

68 Supreme Court of the United States.

THE ALLEGHANY COMPANY, Defendant in Error,
vs.
ISAAC N. E. ALLEN and ALEXANDER S. Bacon, Plaintiffs in Error.
} Bond for Damages and Costs.

Know all men by these presents, that we, Isaac N. E. Allen and Alexander S. Bacon and James Jacques and Alexis Le Coultre are held and firmly bound unto the above named The Alleghany Com-

pany in the sum of twenty-five hundred dollars, to be paid to the said The Alleghany Company for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 7th day of August in the year of our Lord one thousand nine hundred and three.

Whereas, the above-named Isaac N. E. Allen and Alexander S. Bacon have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment, order and decree rendered in the above entitled suit, by the judges of the court of errors and appeals of the State of New Jersey,

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs in error shall prosecute said appeal, to effect and answer all damages and costs, if said plaintiffs in error fail to make good, then this obligation shall be void, otherwise the
69 same shall be and remain in full force and virtue.

ISAAC N. E. ALLEN.
ALEXANDER S. BACON.
JAMES JAQUES.
A. LECOULTRE.

Sealed and delivered, and taken and acknowledged, this 7th day of August, 1903, before me

[Seal of Morton Stein, Notary Public, New York.]

MORTON STEIN,
Notary Public, New York County.

Certificate filed in Kings county.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

James Jacques, being duly sworn, deposes and says that he is worth the sum of four thousand ($4000) dollars over and above all his just debts and liabilities.

JAMES JAQUES.

Sworn to this 7th day of August, A. D. 1903, before me

[Seal of Morton Stein, Notary Public, New York.]

MORTON STEIN,
Notary Public, New York County.

Certificate filed in Kings county.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Alexis Le Coultre, being duly sworn, deposes and says that he is worth the sum of twenty-five hundred ($2500) dollars over and above all his just debts and liabilities.

A. LECOULTRE.

Sworn to this 7th day of August, A. D. 1903, before me.

[Seal of Morton Stein, Notary Public, New York.]

MORTON STEIN,
Notary Public, New York County.

Certificate filed in Kings county.

70 UNITED STATES OF AMERICA,
Southern District of New York, } ss:

On this 7th day of August, in the year of our Lord one thousand nine hundred and three, before me personally appeared Isaac N. E. Allen, Alexander S. Bacon, James Jacques and Alexis Le Coultre, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they duly, severally acknowledged to me that they executed the same.

[Seal of Morton Stein, Notary Public, New York.]

MORTON STEIN,
Notary Public, N. Y. County.

The above bond is hereby approved as to sufficienty and form. Dated August 10th 1903.

WM. S. GUMMERE,
Chief Justice Supreme Court State of New Jersey, and Presiding Judge of the Court of Errors and Appeals, the Chancellor Being Absent from the State.

71 [Endorsed:] 6203 $\frac{731}{21}$ Supreme Court of the United States The Alleghany Company, defendant in error, *vs* Isaac N. E. Allen & Alexander S. Bacon, plaintiffs in error Original Bond for damages and costs on writ of error. Alexander S. Bacon, attorney for plaintiffs in error, 37 Liberty street, Borough of Manhattan, New York city. Due service of a copy of the within bond is hereby admitted. Dated, —— Filed Aug 21 1903 Wm. Riker, Jr., clerk.

In the Matter of the Petition of ISAAC N. E. ALLEN and ALEXANDER S. BACON, Appellants in an Action in the New Jersey Supreme Court Entitled

THE ALLEGHANY COMPANY, Defendant in Error,
against
ISAAC N. E. ALLEN and ALEXANDER S. BACON, Plaintiffs in Error.

Assignment of Errors.

Afterwards to wit: on the first Monday of in the year of our Lord nineteen hundred and three, at the — term for nineteen hundred and three of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said Isaac N. E. Allen and Alexander S. Bacon, by Alexander S. Bacon, their attorney, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:

I. That the demurrer to the second defense set forth in defendants' answer, admitting all the facts alleged in said defense, presents a question of law only, and the statutes of the State of New York as therein set forth, show upon their face, and as interpreted by the highest courts of the State of New York, that the contract set forth in the plaintiff's declaration, is absolutely void, and being a New York contract and unenforceable in the courts of the State of New York, it was error for the courts of the State of New Jersey to enforce the same in that the said courts of the State of New Jersey did not give that full faith and credit to the public acts of the State of New York as required by article IV, sections 1 & 2, of the
73 Constitution of the United States, and § 905 of the Revised Statutes of the United States.

II. That the demurrer to the third defense set forth in defendants' answer, admitting all the facts alleged in said defense, presents a question of law only, and the statutes of the State of Pennsylvania as therein set forth, show upon their face, and as interpreted by the highest courts of the State of Pennsylvania, that the contract set forth in the plaintiff's declaration, is absolutely void, and being a Pennsylvania contract and une-of-rceable in the courts of the State of Pennsylvania, it was error for the courts of the State of New Jersey to enforce the same in that the said courts of the State of New Jersey did not give that full faith and credit to the public acts of the State of Pennsylvania as required by article IV, sections 1 & 2 of the Constitution of the United States, and § 905 of the Revised Statutes of the United States.

III. That the courts of the State of New Jersey, in rendering judgment for the plaintiff, violated the comity required between States of the Union, under the terms of article IV, sections 1 & 2 of the

Constitution of the United States and the laws of the land, in that they did not give that full faith and credit to the public acts of the State of New York and Pennsylvania as required by article IV, sections 1 & 2, of the Constitution of the United States and section 905 of the Revised Statutes of the United States.

IV. That the courts of the State of New Jersey erred in sustaining the demurrer interposed by plaintiff to the second defense contained in the original answer filed in said cause, and by holding and deciding that the facts stated in said second defense were not sufficient to constitute a defense to the cause of action in plaintiff's complaint contained.

V. And the courts of the State of New Jersey erred in sustaining the demurrer interposed by plaintiff to the third defense con-
74 tained in the original answer filed in said cause, and by holding and deciding that the facts stated in said second defense were not sufficient to constitute a defense to the cause of action in plaintiff's complaint contained.

Wherefore the said petitioners, Isaac N. E. Allen and Alexander S. Bacon, pray that the judgment of the supreme court and the court of errors and appeals of the State of New Jersey be reversed and such directions be given that full force and efficacy may inure to defendants by reason of the second and third defenses set up in the answer filed in this cause.

ALEXANDER S. BACON,
Attorney for Appellants, 37 Liberty Street, New York City.

75 [Endorsed:] 6203 $\frac{73}{21}$ United States Supreme Court. The Alleghany Company, defendant in error *vs.* Isaac N. E. Allen & Alexander S. Bacon, plaintiffs in error. Original. Assignment of errors Alexander S. Bacon, attorney for plaintiffs in error 37 Liberty street, borough of Manhattan, New York city. Filed Aug. 21 1903. Wm. Riker, Jr., clerk.

Endorsed on cover: File No. 19,073. New Jersey supreme court. Term No. 119. Isaac N. E. Allen and Alexander S. Bacon, plaintiffs in error, *vs.* The Alleghany Company. Filed September 21st, 1903. File No. 19,073.

(19,073.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 119.

ISAAC N. E. ALLEN AND ALEXANDER S. BACON, PLAINTIFFS IN ERROR,

vs.

THE ALLEGHANY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1904.

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1 Supreme Court of the United States, October Term, 1904.

ISAAC N. E. ALLEN and ALEXANDER S. BACON, Plaintiffs in Error,
against
THE ALLEGHANY COMPANY, Defendant in Error. } No. 119.

In error to the supreme court of the State of New Jersey.

(19073.)

Whereas, the "transcript of record" herein does not contain the correct pleadings and omits much matter that was before the court of errors and appeals of the State of New Jersey, and that should have been printed in this record, it is hereby

Stipulated that the said transcript of record be amended as follows:

Strike out the "plea of defendants" and "replication" found on pages 2, 3, and 4, of the printed record, and insert in the place thereof, or print as an addition to the said record, the "plea of defendants" and "replication" annexed hereto; also add to the present printed record the following papers, hereto annexed, viz:

1. 13 exhibits.
2. Specification of cause of demurrer.
3. Opinion on demurrer (supreme court of N. J.).
4. Rule sustaining demurrer.
5. Assignments of error.

2 6. Joinder in error.

7. Opinion *at* court of errors and appeals.

It is hereby stipulated and agreed that the additions to the record above referred to and hereto annexed in full, be made a part of the transcript of record herein, the same as if certified up with the transcript, and that these additions to the record be printed and attached to the record as now printed.

Dated, New York city, October 1904.

ROB'T B. KILLGORE,
Attorneys for Plaintiffs in Error.
JAMES A. GORDON,
Attorney for Defendant in Error.

3 And the said defendants by Lindabury, Depue & Faulks, their attorneys, come and defend the wrong and injury when &c., and say that they did not promise and undertake in manner and form as the said plaintiff hath above thereof complained against them and of this they the said defendants put themselves upon the country, &c.

And for a further plea in this behalf the said defendants by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided say that the said plaintiff ought not to have or maintain its aforesaid action thereof against them because they say at the time of the making of the said premises and undertakings in the plaintiff's declaration set forth, to wit: on the sixteenth day of July in the year nineteen hundred the said plaintiff was a business stock corporation created and existing under the laws of the State of North Carolina, to wit: at Jersey City, in the said county of Hudson.

And the defendants further aver that the said premises and undertakings in the plaintiff's declaration set forth, were not made in the State of New Jersey, but were made in the State of New York, and that it was then and there provided by the statute of the said State of New York in such case made and provided that "no foreign stock corporation other than a monied corporation shall do business in this State without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this State, and that the business of the corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State for such or similar business or if more than one kind of business by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such
4 corporation so complying with the requirements of law. No such corporation now doing business in this State shall do business herein after December 31st, 1892, without having procured such certificate from the secretary of state, but any lawful contract previously made by the corporation may be performed and enforced within this State subsequent to such date. No foreign stock corporation doing business in this State shall maintain any action in this State upon any contract made by it in this State, unless prior to the making of such contract it shall have procured such certificate," to wit, on the said sixteenth day of July in the year nineteen hundred, to wit, at Jersey City in the said county of Hudson.

And the defendants further aver that at the time of the making of the said promises and undertakings in the plaintiff's said declaration set forth, to wit: on the said sixteenth day of July in the year nineteen hundred, to wit, at Jersey City, in the said county of Hudson, the said plaintiff was a business stock corporation other than a monied corporation foreign to the said State of New York and had not theretofore procured from the secretary of state of the said State of New York a certificate that it, the said plaintiff, had theretofore complied with all the requirements of the law of the said State of New York to authorize it to do business in said State of New York and that the business of the said plaintiff to be carried on in the said State of New York was such as might be lawfully

carried on by a corporation incorporated under the laws of the said State of New York for such or similar business according to the form of the said statute of the said State of New York in such case made and provided.

And the defendants further aver that notwithstanding the said promises, the said plaintiff at the time of the making of the
5 said promises and undertakings in the plaintiff's declaration set forth, to wit, on the said sixteenth day of July, in the year nineteen hundred, to wit, at Jersey City, in the county of Hudson, and at the times of the sale and delivery of the goods and chattels hereinafter mentioned, was doing business in the said State of New York contrary to the form of the said statute of the said State of New York in such case made and provided.

And the defendants further aver that the consideration for the making of the said promises and undertakings in the plaintiff's declaration set forth, was the sale and delivery by the plaintiff to the defendants of divers goods and chattels, which were sold and delivered by the plaintiff to the defendants in the State of New York contrary to the form of the statute of the said State in such case made and provided.

And the defendants further aver that by reason of the premises the said premises and undertakings in the plaintiff's declaration set forth never were, nor are binding on them the said defendants, and were and are of no force or validity and this they, the said defendants, are ready to verify. Therefore, they pray judgment if the said plaintiff *or* to have or maintain its aforesaid action thereof against them.

And for a further plea in this behalf the said defendants by like leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain its aforesaid action thereof against them, because they say that at the time of the making of the said promises and undertakings in the plaintiff's declaration set forth, to wit, on the sixteenth day of July, in the year nineteen hundred, the said plaintiff was a corporation created and existing under the laws of the State of North Carolina, to wit, at Jersey City, in the said county of Hudson.

And the defendants further aver that the said promises
6 and undertakings in the plaintiff's declaration set forth were not made in the State of New Jersey, but were made in the State or Commonwealth of Pennsylvania, and that it was then and there provided by the statute of the said State or Commonwealth of Pennsylvania in such case made and provided that:

1. No foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.

2. It shall not be lawful for any such corporation to do any business in this Commonwealth, until it shall have filed in the office of

the secretary of the Commonwealth a statement under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein, and the certificate of the secretary of the Commonwealth under the seal of the Commonwealth of the filing of such statement shall be preserved for public inspection by each of said agents in each and every of said offices.

3. Any person or persons, agents, officer or employees of any such foreign corporations who shall transact any business within this Commonwealth for any such foreign corporation without the provisions of this act being complied with shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment, not exceeding thirty days and by a fine not exceeding one thousand dollars or either at the discretion of the court trying the same, to wit, on the said sixteenth day of July in the year nineteen hundred, to wit, at Jersey City, in the said county of Hudson.

And the defendants further aver that at the time of the making of the said promises and undertakings in the plaintiff's said declaration set forth, to-wit, on the said sixteenth day of July, in
7 the year nineteen hundred, to wit, at Jersey City, in the said county of Hudson, the said plaintiff was a corporation foreign to the said State or Commonwealth of Pennsylvania and had not theretofore filed in the office of the secretary of the said Commonwealth of Pennsylvania a statement under the seal of said plaintiff, and signed by the president or secretary thereof, showing the title and object of said plaintiff, the location of its office or offices and the name or names of its authorized agent or agents therein, according to the form of the said statute of the said State or Commonwealth of Pennsylvania in such case made and provided.

And the defendants further aver that notwithstanding the said premises the said plaintiff at the time of the making of the said promises and undertakings in the plaintiff's declaration set forth, to wit, on the said sixteenth day of July in the year nineteen hundred, to wit, at Jersey City in the said county of Hudson, did business in the said State or Commonwealth of Pennsylvania contrary to the form of the said statute of the said State or Commonwealth of Pennsylvania in such case made and provided.

And the defendants further aver that by reason of the premises the said promises and undertakings in the said plaintiff's said declaration set forth by the laws of the said State or Commonwealth of Pennsylvania never were nor are binding on them, the said defendants, and are of no force or validity, and this they the said defendants are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain its aforesaid action thereof against them.

And for a further plea in this behalf, the said defendants by like leave of the court here for this purpose first had and obtained accord-

ing to the form of the statute in such case made and pro-
8 vided say that the said plaintiff ought not to be admitted to say that the defendants promised and undertook in manner and form as the said plaintiff hath above thereof complained against them, because they say that after the making of the said several promises and undertakings in the plaintiff's said declaration set forth, to wit, on the twenty-eighth day of December, nineteen hundred, at New York in the county and State of New York, to wit, at Jersey City, in the said county of Hudson, the said defendants were indebted to a large number of persons, to wit, fifty-five persons, in a large sum of money, to wit, forty thousand dollars, which they the said defendants were then and there unable to pay.

And the defendants further aver that thereupon, to wit, on the day and year last aforesaid, at New York aforesaid, to wit, at Jersey City aforesaid, in the said county of Hudson, a meeting of the creditors of them the said defendants was held, and they the said defendants did then and there offer to their said creditors and each of them twenty per cent. of the face value of their respective claims against the defendants or either of them in full settlement thereof, payable five per cent. in cash on or about February 1, 1901, and fifteen per cent. in notes made by the said defendants and indorsed by one William Oppenheim, payable five per cent. in four months and ten per cent. in eight months from said last mentioned date.

And the defendants further aver that the said plaintiff was present at the said meeting of the said creditors of the said defendants and did then and there approve of the said offer so as aforesaid made by the defendants to their said creditors, and did accept the same, and did then and there recommend to the said other creditors of the defendants the acceptance by them of the said offer, to wit, on the said twenty-eighth day of December, nineteen hundred, at New York aforesaid, to wit, at Jersey City, in the said county of Hudson.

And these defendants further aver that afterwards, relying on the said acceptance and recommendation of the said offer
9 by the said plaintiff, a large number, to wit, forty-five of the other creditors of the said defendants, having claims against them for a large sum of money, to wit, the sum of twenty-eight thousand dollars, did mutually accept the said offer and did accept and receive the said percentage of their said respective claims against the said defendants in cash and notes as aforesaid in full settlement of their said respective claims, and did thereupon discharge the defendants from the respective claims of the said creditors last mentioned against them the said defendants, to wit, on the said first day of February, 1901, to wit, at Jersey City, in the said county of Hudson.

And the defendants further aver that afterwards, to wit, on the said first day of February, 1901, to wit, at Jersey City, in the said county of Hudson, the said defendant offered to the said plaintiff to pay to it twenty per cent. of the face value of its said claim against

the defendants in full settlement thereof in cash and notes in accordance with the terms of the said offer, and the plaintiff did thereupon waive the tender to the said plaintiff of the amount of cash and notes dated and indorsed in accordance with the said offer, and that the plaintiff notwithstanding the premises did then and there refuse to accept or receive the same and from thence hitherto has refused and still does refuse so to do, although the defendant has been at all times and still is willing to pay and deliver to the said plaintiff the amount of said offer in cash and notes as aforesaid in accordance with the terms thereof, and this they the said defendants are ready to verify

Wherefore, they pray judgment if the said plaintiff ought to be admitted against its own conduct as aforesaid to say that the defendants promised and undertook in manner and form as the said plaintiff hath above thereof complained against them.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendants.

10 NOTE.—The statute pleaded in the plea secondly above pleaded was passed May 18th, 1892, and the statute pleaded in the plea thirdly above pleaded was passed April 22d, 1874.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendants.

11 The said plaintiff as to the first plea by the said defendants above pleaded, wherein they have put themselves upon the country, doth the like.

And as to the fourth plea by the said defendants above pleaded, the plaintiff says that it ought not to be precluded from having and maintaining its aforesaid action thereof against said defendants by reason of anything in said fourth plea alleged, because it says that it did not on the twenty-eighth day of December, nineteen hundred, or at any other time, accept or agree to accept from the defendants in full settlement of its claim against said defendants twenty per cent. of their claim against said defendants, payable five per cent. in cash on or about February 1st, nineteen hundred (or any time,) and fifteen per cent. in notes made by the said defendants and endorsed by one William Oppenheim, payable five per cent. in four months and ten per cent. in eight months from said last mentioned date; and of this the said plaintiff puts itself upon the country, etc.

And the said plaintiff as to the pleas by the said defendants secondly and thirdly above pleaded, says that the matters therein contained, in manner and form as the same are therein pleaded and set forth, are not sufficient in law to bar or preclude it, the said plaintiff, from having or maintaining its aforesaid action thereof against the said defendants, and that the said plaintiff is not bound by law to answer the same. And this said plaintiff is ready to verify. Wherefore, by reason of the insufficiency of the plea in this behalf,

the said plaintiff prays judgment and its damages by reason of the not performing of the said several promises and undertakings in the said declaration mentioned to be judged to it, etc.

And the said defendants as to the said replication of the said plaintiff to the said fourth plea of the said defendants and
12 which the said plaintiff hath prayed may be inquired of by the country, do the like.

And the said defendants say that their said pleas by them secondly and thirdly above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining its aforesaid action thereof against them, the said defendants, and the said defendants are ready to verify and prove the same, when, where, and in such manner as the said court here shall direct; wherefore inasmuch as the said plaintiff hath not answered the said pleas nor hitherto in any manner denied the same, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining its aforesaid action thereof against the said defendant, etc.

13 EXHIBIT P 1.

Is the note set forth at page 2.

EXHIBIT D 1.

The Western Union Telegraph Company.

Received at Western Union building, 195 Broadway, N. Y., Dec. 28, 1900.

Dated SCRANTON, PA., 28.

To E. C. Spaulding, 220 B'way, New York:

Attend meeting creditors Allen to-day two o'clock their office will not accept offer fifteen per cent. report.

H. C. McKENZIE.

EXHIBIT P 2.

The Western Union Telegraph Company.

Received at the Western Union building, 195 Broadway, N. Y., Dec. 29, 1900.

Dated SCRANTON, PA., 29.

To E. C. Spaulding, care I. N. E. Allen & Co., No. 31 Nassau St., N. Y. city.

Make thorough audit schedule resources. Liabilities see letter.

H. C. McKENZIE.

EXHIBIT P 3.

SCRANTON, PA., *Dec.* 29, 1900.

Mr. E. C. Spaulding, No. 220 Broadway, New York.

DEAR SIR: Yours of the 28th at hand; just wired you to make
thorough audit and schedule of the resources and liabilities.

We wish you to go over the accounts carefully and make a sched
ule showing the resources and liabilities, determine what their in
terest is in the North Carolina plant and find out as near a
14 possible what condition it is in. Send us copy of th
schedule of resources and liabilities and keep your eye ou
especially for any good accounts outside of the State of New Yor
on which we might be able to fasten a foreign attachment. If yo
find any accounts of this nature please mark the address on th
schedule so that we may have all the information necessary. Als
we wish you to pay special attention to the relation of Bacon t
the firm. It looks to us as if he was deliberately allowing his co
cern to go to the wall and trying to settle with the least outlay
cash as Dunn's report shows him to be worth from $25,000 t
$30,000 in quick assets. They reported that he has $10,000 stock i
the Webster Piano Co., and that he also had cash and other item
making his net assets the above figure.

Now unless things look very blue I do not think it advisable fo
us to settle on a 20 % basis, but we can determine that after we ar
in possession of all the facts.

Yours truly, H. C. McKENZIE, *Sec.*

EXHIBIT P 4.

SCRANTON, PA., *Jan.* 2, 1900.

Mr. E. C. Spaulding, No. 220 Broadway, New York.

DEAR SIR: Replying to yours of Dec. 31st, we wish you would g
to Hoboken and get a good attorney and put a foreign attachmen
on the account of H. Kortland. If you see any opportunity of do
ing same thing with the account of H. D. Booth at Paterson withou
too much expense, you can attach that also.

Please do this at once.

Yours truly, H. C. McKENZIE, *Sec.*

15 EXHIBIT P 5.

SCRANTON, PA., *Jan.* 3, 1901.

Mr. E. C. Spaulding, No. 220 Broadway, N. Y.

DEAR SIR: Yours of the 2nd at hand; I have consulted wit
our Mr. Wells and he advises that you go ahead and attach the H
Kortland a/c and the Newark house if it is any good.

You might see them quietly and ascertain whether they will offer us anything more favorable than the 20 % for settlement, but if this is the best they will do take the other course.

Yours truly, H. C. McKENZIE, *Sec.*

EXHIBIT P 6 FOR IDENTIFICATION.

MAY, 2, 1901.

The Alleghany Company, Scranton, Penn.

GENTLEMEN: In the matter of your claim against I. N. E. Allen & Co., have heard from Mr. Warner as to your decision in respect to settlement proposed.

I enclose a copy of a letter sent to creditors recommending settlement according to trust agreement. The original of same is subscribed by your representative, Mr. Spaulding, who was appointed by the creditors as chairman at a meeting of the creditors on December 28, 1900; and who also appointed him one of the committee to examine the books and report on proposed settlement. He was given free access to all books and papers of the company, and knows that they do not show over 7 % on the dollar in assets. The creditors now insist that, as the settlement has not yet been carried out, that we shall protect them against your claim under attachment in New
16 Jersey, and that on that account bankruptcy proceedings shall not be deferred later than the 6th inst., so that the assets shall remain intact.

In case of bankruptcy, I am sure there will be nothing left to distribute among the creditors on account of expense of proceedings and other matters of which I cannot now speak. In the event of bankruptcy we shall not protect our proceedings against the North State Lumber Co., about to be reached for trial.

Mr. McKelvey well knows the situation, and recently agreed to settle the Sloane claim, on which he was suing, upon the basis proposed.

And the other creditors, and especially Messrs. Shiland and Honeyman, who represent three large claims, and who are represented upon the committee of creditors by Mr. Schumacher, as well as the creditors whom I represent, there being several of them, insist that as there are other matters coming up that may put it out of our power to settle with them, that we may as well protect them first as last and go into bankruptcy at once if this matter is not adjusted and we have agreed with them not to settle for over 20 % We have settled with a few creditors, but in doing so have agreed with them that if anyone receives more than 20 % we shall have to pay them the same way and proportionately on their claims in excess of that already paid. This 20 % will be cash to you, and I am authorized to say that if you will come in and accept this settlement we will pay your necessary attorney's disbursements in New Jersey in addi-

tion. This matter will not be delayed beyond the 6th inst. and shall expect to hear from you if you desire to settle upon this basis by Saturday of this week.

Yours respectfully, WM. H. JANES.

P. S.—I enclose assignment, which you can use if desired. Two judgments have been obtained in New York, but creditors have agreed to accept 20 %

17 EXHIBIT D 4.

Telephone, 566.

James A. Gordon, counsellor at law, 586 Newark avenue, opposite court house.

JERSEY CITY, N. J., *May* 13, 1901.

W. H. Janes, Esq.

DEAR SIR: In the matter of the Alleghany Company *vs.* Allen *et als.*, I am instructed by my clients not to accept less than the whole amount of their claim.

Yours respectfully, JAMES A. GORDON.

DEFENDANTS' EXHIBIT No. D 2.

DEAR SIR: The committee appointed at a meeting of creditors of I. N. E. Allen & Co., held on the 28th day of December, 1900, after an examination of the conditions attending the failure and of the prospects of realizing on the assets of the firm, has reached the conclusion that it is to the interest of the creditors to accept the offer contained in the trust agreement herewith enclosed. The only alternative is to force the firm into bankruptcy, and in such event, the committee believes the creditors would realize less than is offered in this agreement. The complications which would arise in bankruptcy proceedings would necessitate considerable litigation in order to realize on the assets, and the delay and expense incident to such litigation would postpone the time, and reduce the amount, of any dividend which the estate might pay. The agreement when signed may be returned to the offices of I. N. E. Allen & Co., 31 Nassau street, New York city.

18 The committee does not wish its recommendation of the acceptance of Allen & Co.'s proposition to be construed as an indorsement of the course which Allen & Co. pursued in carrying on their business after their books showed that they were insolvent.

J. J. McKELVEY, *Chairman.*
E. C. SPAULDING.

Exhibit No. D 3.

Whereas, it appears that the firm of I. N. E. Allen & Company, composed of Isaac N. E. Allen and Alexander S. Bacon, are unable to meet their obligations, and represent that their assets do not appear sufficient to pay twenty per cent. of the claims of their creditors,

Therefore, we, the undersigned creditors of said firm do hereby, for value received, agree with each other and the said firm of I. N. E. Allen & Co. to compromise our claims upon the following basis, viz: We will accept from William Oppenheim hereinafter named, twenty per cent. of the face value of our claims against said I. N. E. Allen & Co., or either member of said firm, in full settlement thereof, payable five per cent. in cash on or about February 1st, 1901, and fifteen per cent. in notes, made by said I. N. E. Allen & Co. and endorsed by said William Oppenheim, payable five per cent. in four months, and ten per cent. in eight months from said date, and in consideration therefor, and for the benefit of all such creditors as shall come in and sign this agreement, the said I. N. E. Allen & Co. does hereby for value received, sell, assign, transfer and set over unto E. F. Perry, or such other person as the creditors of said I. N. E. Allen & Co. may hereafter substitute in place of the said E. F. Perry, all their right, title and interest in and to their claim against the
19 North State Lumber Company, Limited, for five thousand nine hundred and ninety-nine 55/100 ($5,999.55) dollars, and the said I. N. E. Allen does hereby agree to deposit with said E. F. Perry $50,050 par value shares in stock certificates of the capital stock of said North State Lumber Company, Limited, with full power to the said E. F. Perry, or his substitute, to whom he shall in turn deliver the same, if such substitute be designated or appointed, to dispose of the same or to use the same, for the benefit of the creditors of the said I. N. E. Allen & Co., and to apply anything realized therefrom toward the *pro rata* payment of the claims of such creditors who shall come in and sign this agreement, and the said claim against the said North State Lumber Company, Limited, is transferred as aforesaid to the said E. F. Perry, or his substitute, who may be appointed as aforesaid, in trust, for the same purpose.

And to indemnify the said William Oppenheim for his said endorsement of said notes, and that funds may be raised to pay the same as well as said five per cent. cash on the 1st day of February, 1901, the said I. N. E. Allen & Co. and the members of said firm aforesaid, for the benefit of said William Oppenheim and of their creditors does hereby sell, assign, transfer and set over unto said

William Oppenheim all the assets of said firm, both real and personal, wherever situate, except the said claim against and the stock of said North State Lumber Company, Limited, in trust, to convert the same into *came* and to apply the same as follows, to wit: (1) to reimburse and indemnify him for any and all moneys necessary to be paid on account of his endorsements of said notes. (2) to reimburse and indemnify him for any and all expenses necessary to carry out this agreement. And the said William Oppenheim covenants and agrees with the creditors of said firm, and with said firm, that in consideration of the acceptance of said twenty per cent. by said creditors in full settlement of their
20 said claims and of the transfer of said assets to him, and the allowance to him by said creditors and said Allen & Co. of his own discretion in the administering of said assets, which is hereby granted, that should the same realize more than sufficient in his judgment to pay and indemnify him for his endorsement, after deducting all charges against the same to be estimated and made by him in his discretion, he will then pay any balance remaining in his hands to such creditors *pro rata* as shall come in and sign this agreement, and in the event that it shall appear to said I. N. E. Allen & Co. that for any reason this agreement cannot be carried into effect then that the said assets transferred to the said trustees as aforesaid, revest in the said firm and in that event, that the said firm shall file a voluntary petition of bankruptcy, and that the said I. N. E. Allen & Co. and the members of said firm hereby agree to hold themselves ready at all times to protect this agreement and the creditors who sign the same against preferences of all kinds sought to be obtained by any of the creditors of said firm, and will, at the request of the committee appointed by the creditors at their meeting December 29th, 1900, file a voluntary petition in bankruptcy for the benefit of their creditors. Nothing in this agreement shall be construed to prevent the said I. N. E. Allen & Co. from having their assets administered in bankruptcy, and the said creditors of said I. N. E. Allen & Co., upon receipt of said cash and payment of said notes, hereby agree to assign their said claims respectively to said William Oppenheim.

The above named trustees accept their trusts as herein defined, and full power is given and granted to them and each of them to sue and take all manner of proceedings in respect to the assets transferred to them respectively, to enable them to realize thereon, including proceedings in bankruptcy thereon; and the said I. N. E. Allen & Co. and the members of said firm hereby agree to
21 execute in favor of either of said trustees, or the substitute or the successor of either of them, any and all other instruments in writing necessary to protect title in trust in them for the purposes aforesaid, or to enable them to realize upon any of the assets hereby transferred to them.

In witness whereof we have hereunto set our hands and seals this 31st day of December 1900.

I. N. E. ALLEN & CO. [SEAL.]
I. N. E. ALLEN. [SEAL.]
ALEXANDER S. BACON. [SEAL.]
WM. OPPENHEIM. [SEAL.]
E. F. PERRY. [SEAL.]
PARMELE-ECCLESTON LUMBER CO.,
By A. ALEXANDER, *President.*

STATE OF NEW YORK, } ss:
County of New York, }

On the 31st day of December, 1900, personally appeared before me Isaac N. E. Allen and Alexander S. Bacon, to me known and known to me to be the members of the firm of I. N. E. Allen & Company, and the persons of the same name named in and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same; and the said I. N. E. Allen duly acknowledged to me that he executed the same in the firm name of I. N. E. Allen & Company.

MORTON STEIN,
Notary Public, N. Y. Co.

STATE OF NEW YORK, } ss:
County of New York, }

On the 31st day of December, 1900, personally appeared before me William Oppenheim, to me known and known to me to be the person of the same name who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

MORTON STEIN,
Notary Public, N. Y. Co.

22 STATE OF NEW YORK, } ss:
County of New York, }

On the 5th day of January, 1901, personally appeared before me E. F. Perry, to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

THEODORE N. RIPSOM,
Notary Public No. 86, N. Y. Co.

DEFENDANTS' EXHIBIT D 4.

STATE OF NEW JERSEY, } ss:
County of Hudson, }

Edward C. Spaulding, of full age, being duly sworn, according to law, upon his oath saith that he is the agent of the Alleghany Company, a body corporate, that all of the officers of said company are at present absent from the State of New Jersey, that Isaac N. E. Allen and Alexander S. Bacon are neither of them, to the knowledge or belief of deponent, resident at this time in this State, and that said Isaac N. E. Allen and Alexander S. Bacon, partners trading as "I. N. E. Allen & Company," owe to the said The Alleghany Company the sum of nine hundred and ninety-one dollars and nine cents, as he, this deponent verily believes, upon a promissory note given by said I. N. E. Allen & Co., to said Allegheny Company.

EDWARD C. SPAULDING.

Sworn and subscribed to before me this fourth day of Jan. 1901.

FRED N. EBERHARD,
Master in Chancery of N. J.

23 Following this affidavit in the exhibit are (1), sheriff's return, dated Jan. 7/01 (2), inventory dated 1/9/01 (3), attachment dated 1/5/01, and receipt in sheriff's office 1/8/01 (4), appraisal 1/21/01 (5), notices, &c.

EXHIBITS D 5 AND 6

are the same as Ex. 3, except that D 5 is signed by H. C. Magruder, a creditor of Allen & Co., and D 6 is signed by J. W. Lynch, a creditor of Allen & Co.; such signatures follow the typewritten copy signatures of Ex. D 3 (except that of the Parmele Co.).

24 New Jersey Supreme Court.

THE ALLEGHENY COMPANY, Plaintiff, vs. ISAAC N. E. ALLEN and ALEXANDER S. Bacon, Defendants.	On Contract. In Attachment. Specification of Causes of Demurrer.

To Lindabury, Depue & Faulks, attorneys for defendants.

GENTLEMEN: The following is a specification of the causes of demurrer to the second and third pleas filed by you in the above stated cause:

The second plea is not sufficient in law, because the statute of the State of New York therein stated does not render the contract made in the State of New York by a foreign corporation that has failed to procure the certificate referred to in that statute, void, but only forbids, their maintaining a suit in the State of New York upon such contract.

The third plea is not sufficient in law, because the statute of the State or Commonwealth of Pennsylvania therein stated does not render the contract made in the State or Commonwealth of Pennsylvania by a foreign corporation that has failed to procure the certificate referred to in that statute, void, but simply renders the persons, agents, officers or employees of such foreign corporation subject to the fines and punishment mentioned in said statute.

Dated, October 9th, 1901.

JAMES A. GORDON,
Attorney of Plaintiff.

25 *Opinion on Demurrer.*

(Supreme Court of New Jersey, June 9, 1902.)

ALLEGHANY CO.
v.
ALLEN ET AL.

Contracts—Validity—Contravention of statutory regulations.

A contract made in contravention of the statutory regulations of a State and unenforceable in its courts, is not *ipso facto* void.

(Syllabus by the court.)

Action by the Alleghany Company against Isaac N. E. Allen and others. Demurrer to pleadings sustained.

From the brief for defendants the following statement is taken:

"The plaintiff declared upon the common counts, and annexed a copy of a promissory note, with a notice that the action was brought to recover the amount due on that note. To the declaration the defendant pleaded four pleas. The plaintiff replied to two of the pleas, and demurred jointly to the others. If either of the pleas demurred to is good, the defendants are entitled to judgment on the demurrer.

"The pleas demurred to are the second and third. The second plea avers: That the plaintiff was a corporation of the State of North Carolina. That the contract sued upon was made in the State of New York. That the statute of the State of New York provided, *inter alia*, that: 'No foreign stock corporation, other than a moneyed corporation, shall do business in this State without having first procured from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this

State,' etc. 'No foreign stock corporation doing business in this State shall maintain any action in this State upon any con-
26 tract made by it in this State, unless prior to the making of such contract it shall have procured such certificate.' That the plaintiff was a business stock corporation other than a moneyed corporation, foreign to the State of New York, and had not procured such certificate, and that at the time of the making of the said promises, etc., never were nor are binding on the defendants, and were and are of no force or validity.

"The third plea is similar in form, excepting that it avers the contract to have been made in the State of Pennsylvania. The statute of that State, as set out in the plea, provides, among other things, that: 'It shall not be lawful for any such [*i. e.* foreign] corporation to do any business in this Commonwealth until it shall have filed in the office of the secretary of the Commonwealth a statement under the seal of said corporation and signed by the president or secretary thereof, showing the title and objects of such corporation, the location of its office or offices and the name or names of its authorized agent or agents therein. * * * Any person or persons, agent, officer or employé of any such foreign corporation, who shall transact any business within this Commonwealth for any such foreign corporation without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment,' etc.

"The sole question presented by the specification of causes of demurrer is whether or not it is the effect of these statutes to make void contracts made in violation of their terms."

The attention of counsel having been drawn later to the question whether the point was made that the court should refuse to enforce the alleged contract upon principles of comity, counsel for the defendants replied as follows, after citing cases upon the point already argued:

"The principle ruling these cases, and which I submit
27 should rule the present case, is not that this court should refuse to enforce the alleged contract upon any principle of comity, but upon the ground that the obligation of a contract is to be determined by the laws of the place of its making, and that a contract illegal or void in the place where it is attempted to be made is illegal and void everywhere."

Argued at November term, 1901, before Gummere, C. J., and Harrison, Collins and Pitney, J. J.

Jas. A. Gordon, for plaintiff.

Sherrerd Depue, for dependants.

GARRISON, *J.* (after stating the facts):

The only point that has been considered is that made by counsel for the defendants, viz: that a contract that is unenforceable at the *locus contractus* is void everywhere. Numerous decisions, domestic and foreign, are cited to the effect that the courts of a State will not

lend their aid to carry into effect contracts that contravene the legislative policy of such State. These cases establish the proposition that the plaintiff's contract was unenforceable in the State where it was made, but they do not to any degree tend to establish the proposition that such contracts are void elsewhere. This hiatus is thus bridged in the brief of counsel for the defendants:

"The notion that a contract attempted to be made in one State, but void by the laws of that State, can be valid elsewhere, is a legal absurdity. The validity of a contract must always be determined by the *lex loci contractus*. Decosta *v.* Davis, 24 N. J. Law. 319; Insurance Co. *v.* Kinyon, 37 N. J. Law, 33; Atwater *v.* Walker, 16 N. J. Eq. 42; Association *v.* Massarelli (N. J. Ch.) 42 Atl. 284; 285. If by that law, the contract is illegal, or never was legally made, it cannot, on any reasoning, acquire a force and validity in another jurisdiction."

The proposition as stated is a *petitio principii*, and none of the authorities cited support the reasoning of counsel as applied
28 to a statutory requirement of the character under consideration.

The actual state of the law in this respect is that, wherever extraterritorial effect is given to State interdicts of this sort, it is *upon principles of comity*, and not because contracts made in contravention of such interdicts are *ipso facto* void. This is peculiarly so with respect to legislative restrictions upon the business of foreign corporations. A corporation *strictissimi juris* has no life beyond the boundaries of the State that created it. Its existence elsewhere is due solely to comity. As an abstract proposition, every State determines for itself whether it will recognize any corporate bodies but those of its own creation, and as a practical question it decides the terms upon which foreign corporations shall be permitted to invade its territory. In aid of the legislative policy so declared the courts of a State will refuse to entertain suits to enforce obligations that have arisen in the course of transactions thus reprobated. To this extent such obligations lack the sanction of law, but to designate them as void in the sense that immoral or prohibited acts are void is an inexact use of terms. State policies differ in nothing more widely than in their attitude toward corporate affairs, each government having plenary power to enforce its own policy within its own borders, and having no power to impose such policy upon others. Whether comity as a branch of private international law should be extended to this class of regulations, either by enforcing the penalties attached to their violation or by taking note of the local unenforceability of the contracts resulting therefrom, *is not now decided*. A forcible illustration against such a doctrine is found in our own reports in the case of Hendrickson *v.* Fries, 45 N. J. Law, 555. In that case a warrant for confessing judgment was included in the body of a promissory note made in this State, and hence by our statute "declared to be void and of

none effect." Judgment having been obtained upon this
29 note by virtue of such warrant of attorney in the State of Pennsylvania, suit was brought upon the foreign judgment in our own supreme court against the maker, a citizen of New Jersey, whereupon our courts, so far from claiming that comity required that the courts of Pennsylvania should have respected our local law, held that our own courts *would* enforce the contract of record so obtained. In delivering the opinion of the court of errors and appeals, Mr. Justice Depue said: "I think it is clear that this statement must be construed to be a mere regulation of the practice of our own courts. The legislature did not intend to prohibit the making in this State of warrants of attorney for use in other States which are in the form that is legal in their courts." Applying the criterion made use of in this opinion to the statutes set up in the defendants' pleas, they, too, must be construed to be mere regulations of the exercise of corporate functions within the State to which they severally apply, and to evince no purpose to prescribe extra-territorial penalties or consequence. What effect, if any, is to be given to the last mentioned exercise of legislative authority must await its opportunity for decision. For present purposes it is sufficient to say that no attempt in that direction is discoverable in the statutes that are before us upon this demurrer, which are in all respects domestic regulations, and are, by their terms, limited to that sphere of operation.

The point that upon principles of comity we should refuse to enforce the contract set up by the plaintiff's declaration, being unequivocally disclaimed by counsel of defendants, is not passed upon.

Plaintiff is entitled to judgment upon its demurrer.

30 *Rule Sustaining Demurrer.*

New Jersey Supreme Court, June Term, 1902.

THE ALLEGHENY COMPANY *vs.* ISAAC N. E. ALLEN and ALEXANDER S. Bacon.	On Contract. Attachment. Rule Sustaining Demurrer.

The court having heard the argument of counsel on the demurrer of the plaintiff to the second and third pleas of the defendants heretofore filed in this cause and duly considered the same,

It is ordered that said demurrer be sustained.

Entered June 14, 1902.

On motion of

JAMES A. GORDON, *Attorney.*

31 New Jersey Court of Errors and Appeals.

THE ALLEGHENY COMPANY, Defendant in Error, *vs.* ISAAC N. E. ALLEN ET AL., Plaintiffs in Error.	On Error to Supreme Court. Assignments of Error.

Afterwards, to wit, on the first day of December, in the year of our Lord, one thousand nine hundred and two, in the court of errors and appeals, in the last resort in all causes, come the said Isaac N. E. Allen and Alexander S. Bacon, by Lindabury, Depue & Faulks, their attorneys, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

1. That by the record aforesaid, it appears that the judgment, in form aforesaid, was given for the said The Allegheny Company against the said Isaac N. E. Allen and Alexander S. Bacon, whereas, by the law of the land, judgment ought to have been given for the said Isaac N. E. Allen and Alexander S. Bacon against the said The Allegheny Company.

2. There is also error in this, to wit, that the said New Jersey supreme court did sustain the demurrer of the said The Allegheny Company to the plea by the said Isaac N. E. Allen and Alexander S. Bacon, secondly pleaded as appears in the record aforesaid.

3. There is also error in this, to wit, that the said New Jersey supreme court did sustain the demurrer of the said The Allegheny Company to the plea by the said Isaac N. E. Allen and
32 Alexander S. Bacon, thirdly pleaded as appears in the record aforesaid.

4. There is also error in this, to wit, that the said New Jersey supreme court did not enter judgment in favor of the said Isaac N. E. Allen and Alexander S. Bacon against the said The Allegheny Company upon the plea by the said Isaac N. E. Allen and Alexander S. Bacon, secondly pleaded, as appears by the record aforesaid.

5. There is also error in this, to wit, that the said New Jersey supreme court did not enter judgment in favor of the said Isaac N. E. Allen and Alexander S. Bacon against the said The Allegheny Company, upon the plea by the said Isaac N. E. Allen and Alexander S. Bacon, thirdly pleaded, as appears by the record aforesaid.

6. There is also error in this, to wit, that the said justice, before whom, etc., at and upon the aforesaid trial of the said issues so joined between the parties aforesaid, overruled the question, "After you heard of it (the issuing of the attachment previously referred to by the witness) do you know whether or not any petition in bankruptcy was prepared for yourself and Colonel Bacon to sign?"

which said question was then and there asked by the counsel fo the said defendants of Isaac N. E. Allen, a witness called and swor on behalf of the defendants.

7. There is also error in this, to wit, that the said justice, befor whom, etc., at and upon the aforesaid trial of the said issues s joined between the parties aforesaid, overruled the question, "Wer steps then taken towards bankruptcy proceedings by the firm o Allen & Co.?" which said question was then and there asked by th counsel for the defendants of William H. Janes, a witness called an sworn on behalf of the defendants.

33 8. There is also error in this, to wit, that the said justic before whom, etc., at and upon the aforesaid trial of the sai issues so joined between the parties aforesaid, at the close of the tes timony for the respective parties, did direct the jury to return a ver dict in favor of the plaintiff and against the defendants.

Therefore, the said Isaac N. E. Allen and Alexander S. Baco pray that the judgment aforesaid, by reason of the aforesaid error and of other errors appearing in the record and proceedings afore said, be reversed, annulled and held for nothing, and that the sai Isaac N. E. Allen and Alexander S. Bacon may be restored to al things they have lost on occasion of the said judgment, etc.

LINDABURY, DEPUE & FAULKS,
Attorneys for and of Counsel with Plaintiffs in Error.

34 New Jersey Court of Errors and Appeals.

THE ALLEGHENY COMPANY, Defendant in Error,
vs.
ISAAC N. E. ALLEN ET AL., Plaintiffs in Error. } Joinder in Erro

And hereupon, afterwards, to wit, on the fourth Tuesday of Janu ary, A. D., nineteen hundred and three, the said Allegheny Com pany by James A. Gordon, its attorney, comes into court and say that there is no error either in the record and proceedings afore said, or in giving the judgment aforesaid, and it prays here that th court here may proceed to examine as well the record and proceed ings aforesaid, as the matters aforesaid assigned for error, and tha the judgment aforesaid, in manner aforesaid given, may in all thing be affirmed, &c.

JAMES A. GORDON,
Attorney and of Counsel with Defendant.

35 Court of Errors and Appeals N. J., March Term, 1903.

THE ALLEGHENY COMPANY, Pl't'ff & Def't in Error,
vs.
ISAAC N. E. ALLEN ET AL., Def'ts & Pl't'ff in Error. } In Error.

Argued at March term 1903.
James A. Gordon, Esq., for pl't'ff.
Lindabury, Depue and Faulks for def'ts.
The opinion of the court was delivered by

VANSYCKEL, *J.*:

This suit was instituted in the supreme court to recover the amount due upon a promissory note dated July 16, 1900, given by the defendants Isaac N. E. Allen & Co., to the plaintiff company for $1989.54 upon which payments amounting to the sum of $1000. were endorsed.

The defendants pleaded four several pleas:

1. The general issue.

2. That the said promissory note was executed and delivered in the State of New York to the plaintiff company a business corporation created and existing under the laws of the State of North Carolina. That when said note was executed and delivered it was provided by the statute of the State of New York that:

"No foreign corporation * * * shall do business in this State without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this State, and that the business of the corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State.

36 * * * No foreign stock corporation doing business in this State shall maintain any action in this State upon any contract made by it in this State, unless prior to the making of such contract, it shall have procured such certificate."

The New York law as originally passed was less stringent, and provided as follows:

"No foreign stock corporation doing business in this State without such certificate shall maintain any action in this State upon any contract made by it in this State until it shall have procured such certificate."

Laws of 1892 ch. 687 sec. 15.

The statute was subsequently amended and was in the form above set forth at the time the said promissory note was given.

The second plea further averred that at the time of the making of the said promissory note the plaintiff was a business stock corporation other than a monied corporation foreign to the State of

New York, and had not theretofore procured from the secretary of state of said State of New York a certificate that it had theretofore complied with all the requirements of the law of said State to authorize it to do business in said State, and that the business of said plaintiff — be carried on in said State was such as might be lawfully carried on by a corporation incorporated under the laws of said State for such or similar business according to the form of the said statute of New York in such case made and provided.

And the said plea further averred that the said plaintiff at the time of the making of the said promises and undertakings and at the times of the sale and delivery of the goods and chattels for which the said promissory note was given, was doing business in the said State of New York contrary to the form of the statute aforesaid, and that said goods and chattels were sold and delivered by the plaintiff to the defendants in the State of New York.

37 3. The third plea sets out that the said promissory note was made and executed in the State of Pennsylvania to the plaintiff company a foreign corporation created and existing under the laws of the State of North Carolina.

That when said note was executed and delivered it was provided by the statute of the State of Pennsylvania that: "1. No foreign "corporation shall do any business in this Commonwealth until "said corporation shall have established office or offices and ap- "pointed an agent or agents for the transaction of business therein

"2. It shall not be lawful for any such corporation to do any "business in this Commonwealth, until it shall have filed in the "office of the secretary of the Commonwealth a statement under the "seal of the said corporation, and signed by the president or secre- "tary thereof, showing the title and object of said corporation, the "location of its office or offices, and the name or names of its attor- "ney, agent or agents, therein, and the certificate of the secretary of "the Commonwealth under the seal of the Commonwealth of the "filing of such statement shall be preserved for public inspection by "each of said agents in each and every of said offices.

"3. Any person or persons, agents, officers or employees of any "such foreign corporation who shall transact any business within "this Commonwealth for any such foreign corporation without the "provisions of this act being complied with shall be guilty of a mis- "demeanor and upon conviction thereof shall be punished by "imprisonment, not exceeding thirty days and by a fine not exceed- "ing one thousand dollars or either at the discretion of the court "trying the same."

The said plea further averred that at the time of the making of the said promissory note the said plaintiff was a corporation foreign to the said Commonwealth of Pennsylvania and had

38 not theretofore filed in the office of the secretary of the said Commonwealth a statement under the seal of said plaintiff and signed by the president or secretary thereof, showing the title

and object of said plaintiff, the location of its office or offices and the name or names of its authorized agent or agents therein acccording to the form of the said statute of the said Commonwealth.

And the said plea further averred that notwithstanding the said premises the said plaintiff at the time of the making of the said promissory note did business in the said Commonwealth of Pennsylvania contrary to the form of the said statute.

4. The fourth plea alleges that the plaintiff joined with other creditors in accepting and receiving a percentage of its claim in full satisfaction of its said promissory note, and discharged the defendant from further liability thereon.

The plaintiff demurred to the second and third pleas, which on argument before the supreme court were held to be no sufficient answer to the plaintiff's cause of action, and the cause was thereupon sent down to the circuit court of Hudson county for trial on the issue of fact raised by the fourth plea.

The trial judge there directed a verdict for the plaintiff, and we are of opinion that in such direction there was no error, for the reason that there was no evidence which would have justified the jury in finding that the plaintiff through its agent, or otherwise had accepted the offer of settlement.

Error is assigned upon this direction of the trial judge, and also upon the judgment of the supreme court upon the demurrers to the second and third pleas aforesaid.

The first question to be considered is whether the contract made in New York can be enforced in this State?

There are two settled rules which must be applied to the
39 determination of this question, as well as to the effect of the Pennsylvania statute.

(1.) A contract void by the law of the State where made will not be enforced in this State.

Columbia Fire Ins. Co. *vs.* Kinyon 8 Vr. 30.

A contract void at the place where made is illegal and void everywhere.

Hyde *vs.* Goodnow 3 Comstock 266.

(2.) When the statute of the State where the contract is made does not expressly declare the contract to be void and recourse must be had to interpretation to settle the question of its validity the construction given to the statute by the courts of the State which enacted it will be adopted here.

Lane *vs.* Watson 22 Vr. 186 same case affirmed 23 Vr. 550.

If therefore the New York statute expressly declared the promissory note in suit to be a void contract, or if the courts of New York have adjudged that the statute of that State is to be construed to that effect, the same effect must be given to it here, and it must be held to furnish no legal foundation for an action in our courts.

The New York statute does not in terms declare the contract void, it provides that no suit on it shall be maintained in that State. No case has been brought to our attention in which the courts of New York have held that under the statute as it now exists, the contract made in that State is void.

In Newchatel Asphalt Co. *vs.* The Mayor 155 N. Y. 373, which was an action upon a contract made under the law as framed in 1892, the New York court of appeals decided that the purpose of the act was, not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations. That it provided no penalty in the event of the non-compliance, other than the suspension of civil remedies, and that such
40 and such only were the consequences of the violation of the statute, and none other will be implied as intended by the legislature.

This construction of the statute is manifestly the correct one, and it has been adopted by other courts,

Mills *vs.* Goddard, 69 Fed. Rep. 141.

Sullivan *vs.* Beck, 79 Fed. Rep. 200.

American Insurance Co. *vs.* Wellman 69 Ind. 413.

When the rule of comity is invoked it might with equal force have been insisted under the New York act, as it stood in 1892, that the contract should not be suable outside of the State of New York until compliance with the statutory provisions of that State.

Comity does not require a broader effect to be given to legislation than the State which enacted it impresses upon it. The North Carolina corporation may justly claim the right to enforce in our jurisdiction a contract which has not been pronounced to be void either by the legislature or the judiciary of New York.

Personal disqualifications, and especially such as are of a penal nature, are strictly territorial in their operation.

Story on Conflict of Laws § 104.

The New York legislature had the exclusive right to declare what consequences should follow the failure to comply with the law in order to secure effective control over the business, and having in the act provided for no penalty on the foreign company other than denial of the right to maintain an action in New York, the courts of this State should not penalize the foreign corporation to a greater extent by declaring the contract void, or by increasing the disability imposed by the New York act. State laws have no extra territorial effect for the enforcing of penalties.

41 The fact that the amendment of the act of 1892 provides that "no action shall be maintained in New York upon any "contract made by it in that State unless prior to the making of "such contract it shall have procured the certificate," without declaring that in such case, the contract shall be void, suggests very

strongly the inference that the New York legislature did not intend to give it that effect.

The tendency of judicial decision on this subject, when the statute does not declare the contract to be void, is to a strict construction, maintaining the validity of the contract, and holding that the only effect of such legislation in the State where it is enacted is to impose the prescribed penalties and the expressed disabilities. Outside of such State until its courts give the legislation a wider scope no greater latitude will be attributed to it. See cases cited in 6 Thompson on Corporations § 7957.

In my judgment the second plea is no bar to the plaintiff's right of action.

The Pennsylvania statute remains to be considered.

It expressly provides that it shall not be lawful for the corporation to do business in that State until compliance, and makes the agent or officer of the corporation, through whom a corporation must necessarily act, subject to indictment and imprisonment for violation of the act.

The courts of Pennsylvania we think have properly held that a contract made in violation of the statute is void and that must be the accepted law in this State.

Lasher *vs.* Stimson 145 Penn. St. 30.

Delaware River Quarry Co. *vs.* Bethlehem 53 Atl. Rep., 533.

If therefore the third plea contains averments which show that the promissory note sued on was a contract made in contravention of the Pennsylvania statute, it is void and unenforceable in New Jersey.

42 In D. & H. Canal Co. *vs.* Maklenbrook, 34 Vr. 281, this court said that a foreign corporation which makes a single sale of its product and accepts a guarantee of payment in this States does not transact business in contravention of our statute which prohibits foreign corporations to transact any business in this State without authority first obtained therefor.

In the recent case of Delaware River Quarry Co. *vs.* Bethlehem, *supra*, in the supreme court of Pennsylvania, Judge Feil in delivering the opinion of the court said, "This act has been liberally con-"strued, and isolated transactions between a foreign corporation and "citizens of this State have been held not to come within its pro-"hibition."

The cases on this subject are cited in the opinion of Judge Scott in the court below, which appears on page 533.

Judge Mitchell who dissented from the opinion delivered by Judge Fell, on other grounds, said "The act of 1874 is a highly "penal act, and the dishonest use made of it in this case is a sharp "reminder of the necessity of adherence to the general rule of strict "construction of such statutes. This was but a single transaction, "although it occupied several months. I cannot consider it a "'doing of business' within the statute."

The controversy as to the third plea turns therefore upon the question whether it contains allegations which show that the said promissory note was given in pursuance of business carried on in the State of Pennsylvania, and not in consummation of a single transaction.

The plea as to the New York statute is much broader and more ample than the third plea.

It avers that at the time of the sale and delivery in New York of the goods for which the note was given, the plaintiff was
43 doing business in New York contrary to the statute of that State.

The third plea after reciting the Pennsylvania statute avers that at the time of making the note the plaintiff was a foreign corporation which had not complied with the requirements of the said statute.

The only averment to bring the plaintiff within the penalty of the act is that at the time of making the said note the plaintiff did business in the State of Pennsylvania contrary to the form of the statute.

There is no intimation in this plea, certainly no allegation that this note had any connection with business unlawfully transacted in Pennsylvania, or that it was given for goods sold and delivered in Pennsylvania.

The demurrer admits that the note was given in Pennsylvania, and it also admits that at the time the note was given the plaintiff did business in the State contrary to its statute, but it does not admit that of that unlawful business this note was a product. The admitted averments may be true, and yet the note may have been given for an obligation contracted out of the State of Pennsylvania, and consequently not in violation of its laws. It is quite clear under the Pennsylvania cases that the agent of the plaintiff would not have subjected himself to the penalties of the act by taking a note to the company for such a debt.

The institution of a suit to collect a loan, the taking a subscription to capital stock, the purchase of shares of stock in Pennsylvania corporations, or buying merchandise to use at home, executing a lease of personal property, and any other isolated act which from its nature is not continuous, are transactions which are held not to be in contravention of the Pennsylvania statute.

The cases are cited in Delaware River Quarry Co. *vs.*
44 Bethlehem R'way Co. *supra.*

The averment in the third plea might be made if the only act of this plaintiff in the State of Pennsylvania had been the taking of the note sued on. The taking of a note is a business act, and in taking it plaintiff did business, but such a transaction is not prohibited.

The rule of pleading is well settled that to defeat the plaintiff's right of action, the plea must contain allegations which show conclusively that there is no cause of action.

It is a maxim in pleading that everything shall be taken most strongly against the party pleading, or rather, that if the meaning of the words be equivocal they shall be construed most strongly against the party pleading them, for it is to be intended, that every person states his case as favorably to himself as possible.

1 Chitty's Pl. 242; 1 Saunders 259 N 8.

This rule applies with even more strictness to pleas than to a declaration: Where a plea has two intendments it shall be taken strongly against the defendant.

In pleading a promise which must be in writing, the declaration need not declare that it is writing, but it is otherwise in a plea.

1 Chitty's Pl. 522–303.

1 Saunders' Reports 276 (*a*) 277 A and note.

Gould's Pl. ch. 4 sec. H 6.

To constitute a bar to an action on a contract, by setting up a highly penal statute, there must be a precise averment of sufficient facts to bring the case within the statute, it cannot be based upon inference.

Contrary to my first impression my conclusion is that the third plea discloses no defence to the action, and the judgment of the supreme court on the demurrers as well as the judgment of the trial court should be affirmed.

Endorsed: "Filed Jul- 21, 1903. S. D. Dickinson, clerk."

45 [Endorsed:] United States Supreme Court. October term, 1904. No. 119. Isaac N. E. Allen and Alexander S. Bacon, pl'ffs in error, ag'st The Alleghany Company, d'f'd't in error. Stipulation and additions to record. Alexander S. Bacon, attorney for pl'ffs in error, 37 Liberty street, borough of Manhattan, New York city.

46 [Endorsed:] File No. 19,073. Supreme Court U. S. October term, 1904. Term No. 119. Isaac N. E. Allen *et al.* plaintiffs in error *vs.* The Alleghany Company. Stipulation and addition to record. Filed Nov. 29, 1904.

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Clerk.

IN THE

Supreme Court of the United States.

October Term, 1904.

No. 119.

ISAAC M. E. ALLEN AND ANOTHER,
Plaintiffs in Error

vs.

THE ALLEGHANY COMPANY,
Defendant in Error

Brief of Allen & Co., Plaintiffs in Error.

ALEXANDER S. BACON,
Counsel for Plaintiffs in Error.

New York:
CHAS. P. YOUNG CO., Law Reporting and Printing,
49 John Street. [Tel., 1276 John.]

Supreme Court

OF THE UNITED STATES.

ISAAC N. E. ALLEN and ano.,
Plaintiffs in Error,

vs.

THE ALLEGHANY COMPANY,
Defendant in Error.

Brief of Allen & Co., Plaintiffs in Error.

The writ of error brings up for review a judgment of the New Jersey Court of Errors and Appeals (p. 37 of "Transcript"), which affirmed demurrers to two defences and affirmed judgment by direction of the Court on the trial before a jury, on a further defence.

Statement of Facts.

The "Transcript of Record" was strangely defective. It did not contain the right answer of defendants and omitted much that was before the New Jersey Court of Errors and Appeals. An "Addition to the Record" contains the omissions.

The declaration is found at page 1 of the "Transcript" and the amended answer at pages 1-6 of the "Addition to the Record."

The important papers for the United States Supreme Court are the declaration (p. 1 of "Transcript"), the answer, containing pleas 2 and 3, demurred to (pp. 1-6 of "Addition"), specification of causes of demurrer (p. 14 of "Addition"), opinion of the Supreme Court on demurrer (p. 15 of "Addition"), opinion of Court of Errors and Appeals (p. 21 of "Addition") assignments of error (p. 19 of "Addition").

The Alleghany Company is a North Carolina corporation, having its principal place of business at Scranton, Pennsylvania (11, p. 7 of "Transcript"), where most of its business is done. It also did business in the State of New York. It sold lumber to Allen & Co., who gave their promissory note. After a payment on account, Allen & Co. failed, and made a compromise with their creditors. The Alleghany Company had a representative at the meeting of creditors. He was made chairman of the meeting and was appointed one of a committee to examine into the affairs of Allen & Co. (13, p. 9 of "Transcript"). This committee recommended a compromise of 20 per cent. (Exhibit Q2, p. 10 of "Addition to Record"). On the strength of this recommendation, the other creditors accepted the compromise. The Alleghany Company's representative kept them constantly advised by letter and telegram. Having found out, by reason of his position on the committee, that there was some property standing in Mr. Allen's name in New Jersey, he caused an attachment to be made secretly, while he was still recommending the compromise to the other creditors. The fact of this attachment was not known to Allen & Co. until a few days before the expiration of the four months during which bankruptcy proceedings would be effective. The Alleghany Company made evasive replies to offers of compromise, until, through a mistake as to the date of the attachment, bankruptcy proceedings were too late.

The four defences pleaded are as follows (p. 1-6 of "Addition to Record"):

1. General denial (waived) (p. 1 of "Addition").

2. The contract was made in New York, where the plaintiff was doing business in violation of law, not having complied with the New York laws in relation to foreign corporations, filing certificates, &c. (p. 2 of "Addition.")

3. The contract was made in Pennsylvania, where the plaintiff was doing business in violation of law, not having complied with the Pennsylvania laws in relation to foreign corporations filing certificates, &c. (p. 3 of "Addition.")

4. The Alleghany Company had accepted the proposition of the creditors, had recommended its acceptance to other creditors who, relying on such recommendation, had carried out its terms, and plaintiff was therefore estopped (bottom p. 4 of "Addition").

The Alleghany Company demurred to the second and third defences. The demurrer was sustained by the Supreme Court (four judges) in an opinion found at page 15 of "Addition," in which it was held that the contracts were void in New York and Pennsylvania, and, on principles of comity, would not be enforced in New Jersey, nevertheless, as the defendants' attorney has maintained that they were void in New Jersey and had not invoked the principles of comity, the demurrers were sustained. We think this strange reasoning, and an examination of the defendants' brief shows that the Court misconstrued it. The attorney denied the alleged disclaimer.

Defendants then appealed to the New Jersey Court of Errors and Appeals (about 15 or 20 judges), and this appeal brought up for review, the demurrers sustained by the Supreme Court and the alleged errors of the Circuit Court in directing a verdict. The New Jersey Court of Errors and Appeals affirmed the courts below, and from that affirmance a writ of error was allowed to the Supreme Court of the United States by Chief Justice Gummere.

The opinion of the New Jersey Court of Errors and Appeals is found at page 21 of the "Addition." That court does not sustain the demurrers on the ground set forth by the Supreme Court. In substance, it hold that the New York law, while it admittedly *forever* forbids a recovery in the courts of the State of New York, did not, *in terms*, hold the contract *void* and, therefore, the New Jersey courts will enforce a contract that never could, either in times past or times to come, be enforced in the sister State of New York. The New York statute is new (1901); its terms are plain; but the New York Court of Appeals has never passed upon this particular statute; therefore, the New Jersey court enforces a contract admittedly unenforceable in New York.

The Court of Errors and Appeals also held that the Pennsylvania statute did render the contract void and it was, therefore, non-enforceable in New Jersey, but held that the defendants' answer was not sufficient, and, to make it insufficient, reads into it words not to be found in it.

Neither the plaintiff's "specifications of causes of demurrer" (p. 14 of "Addition"), nor the opinion of the Supreme Court (p. 15 of "Addition"), nor any brief, has suggested any insufficiency in the pleading. This point has never been argued; it was new with the New Jersey Court of Errors and Appeals, and was upon their own suggestion.

The grounds upon which the writ of error was

granted are found at page 41, 42 of the "Transcript." 119 U.S. 615, 616

The position taken by the New Jersey Court is a very serious one. If a New York contract is prohibited by the laws of the State of New York and the penalty attached to that prohibition is perpetual unenforceability by the Courts of the City of New York, it is a very serious matter if the State of New Jersey be permitted, just across the river in Jersey City, to enforce New York contracts that are prohibited to be made in the State of New York, and if made, are absolutely and forever unenforceable under the laws of that State. The New Jersey Court seems to have made a distinction between unenforceable and void contracts.

The defendants, Allen & Co., strenuously maintain that the plaintiff ought not to recover, first, in good morals, on account of its deceitful conduct at the creditors' meeting; second, because the New York statute, under the pleadings, admitted by the demurrer, makes the contract absolutely void and nonenforceable in New Jersey; third, because the contract is admittedly void in Pennsylvania and the pleading of the Pennsylvania statute and of doing business thereunder was good; the same in both pleas—New York and Pennsylvania. Allen & Co. pray, therefore, that the judgment be reversed and the demurrers sustained.

THE NEW YORK STATUTE (p. 2 of "Addition").

The New York Statute states that "no foreign "corporation * * * *shall do business* in this "State without having first procured from the Sec- "retary of State a certificate that it has complied "with all the requirements of law to authorize it "*to do business* in this State, and that the business "of the corporation to be carried on in this State "*is such as may be lawfully carried on* by a corpora- "tion incorporated under the laws of this State. "* * * *No foreign stock corporation* doing busi-

"ness in this State *shall maintain any action in* this "State *upon any contract* made by it in this State, "unless, *prior to the making of such contract,* it "shall have procured such certificate" (Amendment of 1901).

The New York Statute was formerly less stringent. Before the amendment, the law was as follows: "No foreign stock corporation, doing busi- "ness in this State without such certificate shall "maintain any action in this State upon any con- "tract made by it in the State *until it shall have "procured such certificate"* (Laws 1890, Chapter 563, §15 as amended; Laws 1892, Chapter 687).

In other words, the New York law states that no foreign corporation "*shall do business* in the State" without such a certificate, and *forever* forbids the maintaining of any action upon any contract made in the State of New York entered into in violation of the prohibition.

The present statute differs from the old New York law (and from the law in many of the States) which merely *postponed* the maintaining of an action until after the law was complied with. Under the present law, if a contract has been made before the filing of the certificate, no act of the corporation will ever be able to correct the fault and open to it the Courts of New York.

Under the old law, a debt was not due—its collection was merely postponed—until the statute was complied with. Under the new law (1901) the debt never becomes due—its collection is barred forever. This interpretation is not disputed by the New Jersey Courts.

THE PENNSYLVANIA STATUTE (p. 3 of "Addition").

The Pennsylvania statute differs from the New York statute both in wording and substance. The foreign corporation is forbidden to do "any business," as in the New York statute, but the law goes further and expressly declares such business to be

unlawful. The statute says: "*It shall not be law-*"*ful* for any such corporation to do any business "in this Commonwealth," and while the Courts of the State are not by the statute, expressly closed to the corporation doing business in violation of law, and no penalty attaches to the corporation itself, nevertheless, its agents are guilty of a misdemeanor and punishable with thirty days' imprisonment and $1,000 fine, and the Pennsylvania Courts have as effectually closed their doors upon the offending corporation as has the New York statute.

The New Jersey Court of Errors and Appeals holds that, inasmuch as the New York Court of Appeals has not specifically interpreted the new statute, the New Jersey Courts will not hold the contract void, but will enforce it, although admitting that it could not be enforced in New York.

It holds the contract void under the Pennsylvania statute, and decisions, but injects into defendant's answer words that are not there, and holds the suppositious answer insufficient.

POINT I.

The object of foreign corporation laws.

Probably every State in the Union has laws of some character imposing duties, restrictions, obligations and penalties upon foreign corporations as a condition precedent to doing business within the State. The sanctions of these statutes vary widely, from mere penalties imposed upon officers and employees to absolute prohibition upon non-conforming corporations; some make all contracts unlawful, impose penalties on officers, and forbid the use of the courts to enforce contracts. These statutes are not against public policy; they do not offend

the public conscience; every State has them; New Jersey has them. If this contract had arisen in New Jersey and the Alleghany Co. were doing business there, the contract could not be enforced there.

There is no question as to the constitutionality of these laws, providing they do not impose restrictions upon interstate commerce. A foreign corporation is not a "person" protected by the Constitution of the United States, and whether or not such corporation shall be permitted to do business at all outside of the limits of its own State is purely a matter of comity concerning which no one has a right to complain. Sometimes, when the statutes of any State are thought to be unreasonable, retaliatory statutes have been passed.

The object of this class of legislation is to impose duties, obligations, restrictions, prohibitions and penalties *upon the corporation.* They never inflict any duty, obligation, restriction, prohibition or penalty *upon the domestic citizen.* No statute has ever made it a misdemeanor for a citizen to do business with a prohibited corporation, and no statute has ever forbidden the use of its courts to a domestic citizen by reason of such statutes. All the restrictions and penalties are upon the corporation, none upon the citizen. The citizen can invoke the statute to prevent the collection of a debt, but the corporation is not permitted to invoke the statute in its own defense, thereby deriving benefit from its own wrong.

Contracts made in violation of these statutes may not be *malum in se,* but they are *malum prohibitum* and are like usurious contracts, which are not considered immoral, but are merely prohibited to certain persons and in certain places., In New York, corporations cannot plead usury, and certain transactions are exempt. The foreign corporation and the usurer only are "prohibited," the statutes do not restrict the domestic citizen or the usurer's victim; and these laws are construed differently

when applied to one or the other class. This distinction is important.

The objects of these statutes are twofold: First, in the interest of the State; second, in the interest of the citizen. They are never in the interest of the foreign corporation.

Very frequently these statutes are imposed in the interest of taxation by the state in which foreign corporations do business (as is the N. Y. Statute), and the collection of taxes is one of the first and most important functions of government. These laws are, therefore, to be liberally construed in the interest of the State.

They are also in the interest of fair play. A domestic corporation, paying taxes and doing business at home should not be required to compete with a foreign rival, which has its headquarters and all its capital invested in the same city and yet pays no taxes.

These statutes are also in the interest of the domestic citizen, who is liable to be defrauded by dealing with irresponsible corporations, or corporations that may be doing an unlawful business according to the laws of the state wherein they operate. The New York statute requires a certificate to be filed, showing that the foreign corporation is carrying on a business "such as can be lawfully carried on" in the State of New York. The writer once had occasion to collect insurance on one fire loss from about thirty companies and one of these companies was *unknown* at the post office in a town in Virginia designated as the office of the company, and it was found that this was merely a paper company and was but a *nom de plume* under which an irresponsible Chicago broker was fleecing the public.

Perhaps the most important object of these statutes is to require every foreign corporation doing business within the State to have a duly appointed agent upon whom process can be served so that the domestic citizen, having done business with the foreign corporation, will not be relegated to a dis-

tant forum to obtain justice when controversies arise.

The statutes are beneficent. They meet with the approval of legislatures, courts and the public conscience, and they should be liberally construed and cheerfully enforced.

In short, all of these statutes are in the interest of the state and the citizen, and never in the interest of the foreign corporation which asks the favor of doing business away from home. Under them a contract that may be lawful on the part of the citizen may be absolutely void as regards the corporation.

It will be remembered that, in this action, an offending corporation seeks to enforce a contract prohibited by statute.

POINT II.

The different kinds of prohibiting statutes.

One of the most lenient of thees statutes is found in Colorado, which imposes no penalty upon the corporation and no prohibition in the use of the court, and casts no reflection upon the contract itself. It merely imposes a penalty upon the agent. It has been held that the penalty is exclusive and that the contracts are not void, and may be enforced not only in Colorado, but elsewhere. As Colorado courts enforce them, of course, other courts do.

Other statutes, like those in Indiana, impose no prohibition other than to forbid the use of the domestic court *until* the required certificate shall have been filed. The Indiana courts have uniformly held that a plea of the statute is a good plea in abatement and that the foreign corporation could not recover. Yet the Indiana contract is not declared to

be unlawful; it merely *has not become due,* and the corporation can mature the contract at any time by filing the requisite certificate.

Such was formerly the statute in the state of New York. Under the present New York statute the prohibition is perpetual. Under the admissions of the demurrer the plaintiff is a foreign corporation doing business in the State of New York, and entered into this contract in that State without having filed the requisite certificate; and the plaintiff is *forever* barred from maintaining an action on the claim, because the statute provides that "no for-"eign stock corporation * * * *shall do bus-"iness in this State* without having first procured," &c. The statute first prohibits the act and then forbids maintaining any action on the prohibited contract.

The Pennsylvania statute is still more drastic. It not only provides that "no foreign corporation "*shall do any business in* this Commonwealth until," &c., but it also provides that "*it shall not* "*be lawful* for any such corporation to do *any* busi-"ness in this Commonwealth," and then makes it a misdemeanor for any agent or officer to transact any such business.

The Pennsylvania statute says nothing about prohibiting the use of its Courts for the enforcement of such prohibited contracts, but it is needless to say that the Pennsylvania Courts have determined that any contract unlawful under the terms of this statute cannot be enforced; so that, practically, the Pennsylvania statute contains everything set forth in the New York statute with the additional penalty upon the officers and agents, and a plainer statement that the business is *unlawful* as well as *prohibited.*

In Lasher vs. Stimson, 145 Pa. St., 30, the Court says: "Those terms (of the Pennsylvania law) are "not onerous, or in conflict with any constitutional "provision or rule of public policy. But they are "clearly prohibitory, and they indelibly stamp as

"*unlawful any* business transaction within the "State by a foreign corporation which has not com- "plied with them. It is only by the observance of "them that it can have a legal existence for business "purposes within this jurisdiction, or *acquire con- "tractual rights which our Courts will recognize* "Thorne vs. Ins. Co., 80 Pa., 15)."

Thorne vs. Travelers Ins. Co., 80 Pa., 15, 21 Am. Rep., 89, was an action by a foreign corporation to recover moneys collected by an agent. The Court says: "It has often been held that an action found- "ed on a transaction *prohibited* by statute *cannot be "maintained,* although a penalty be imposed for "violating the law, and it is not expressly declared "that the contract be void (Citations). * * * "It is founded on general principles of policy which "he (defendant) shall have the advantage of, *con- "trary to the real justice between the parties.* The "principle of public policy is that no Court will lend "its aid to a party who grounds his action upon an "immoral or *illegal act.*"

The construction of the Pennsylvania statute by the Pennsylvania Courts has been followed by the New Jersey Court of Errors and Appeals in this case.

"In construing the statutes of another State, the "Courts of this State must accept as conclusive, the "construction put thereon by the highest judicial "tribunal of the former State" (Watson v. Lane, 22 Vroom., 186; 23 Vroom., 550).

The New Jersey statute is not materially different from the statutes of Pennsylvania or New York. It is one of the *strong,* not one of the weak statutes like Colorado or Indiana or the old New York statute. The plaintiff could not have enforced this contract in New Jersey, if it had arisen there.

Is a contract illegal, void and unenforceable in Philadelphia, legal, valid and enforceable in Camden? It cannot be said that the Pennsylvania or

New York statutes shock the moral sense of New Jersey, for New Jersey has similar statutes.

Can the Courts of New Jersey enforce a contract made in Pennsylvania or New York that it would not enforce if made in New Jersey in similar circumstances? That is a question involved in this controversy.

POINT III.

Comity.

Private international law or "the comity of nations" is not as fixed as statute law, yet has a firm place among civilized nations and "is a part of the "law of England and of the United States, and "must be ascertained by the courts of justice as "often as such questions are presented in litiga- "tion between man and man, duly submitted to "their determination. (Hilton v. Guyot, 159 U. S., "113; Snashall v. Metropolitan R. Co., 12 D. C., "319). * * It is the recognition which one na- "tion allows within its territory to the legislative, "executive or judicial acts of another nation, hav- "ing due regard both to international duty and "convenience, and to the rights of its own citizens "or of other persons who are under the protection "of its laws" (Am. & Eng. Enc. Law, 2d Ed., Vol. 22, Title, "Private International-Law," p. 1319, from which we quote further).

It will be enforced, if such enforcement would not contravene the settled policy of the forum or be prejudicial to the interest of its citizens (Brently v. Whittemore, 4 C. E. Green Eq., 462; Watson v. Murray, 8 C. E. Green, 257).

(Page 1322) "The general rule established *ex "comitate et jure gentium,* is that the place where

"the contract was made or the *lex loci contractus*, "as it is frequently called, and *not that where the* "*action is brought*, is to be considered in expound- "ing and ENFORCING the contract.

(Page 1327) "The place of making a contract "governs as to the formalities necessary to its va- "lidity. Thus, where, by the law of the country "in which an instrument is executed, *it is invalid* "without a stamp, it will be invalid everywhere."

"As a general rule, the validity of a contract as "affected by the statutes of frauds in the various "jurisdictions is regarded as a matter pertaining "to the formal execution of the contract, and is con- "trolled by *the law of the place where the contract* "*is entered into*" (Page 1327).

(Pages 1329-30) Contracts made on Sunday, when invalid by the law of the *lex loci*, are invalid everywhere. The same is true of gambling contracts and laws relating to usury and champerty.

(The usual questions of *lex loci, lex fori, contra bonos mores*, public policy, &c., do not arise in this action as the laws and consciences of Pennsylvania. New York and New Jersey are not substantially different on the questions at issue.)

"*If a contract by a foreign corporation is not* EN- "FORCEABLE *in the State where made, because of non-* "*compliance by the corporation with the statutory* "*conditions precedent to doing business in that* "*State it has been held that the contract will not be* "ENFORCED *by the Courts of another State*" (Am. & Eng. Enc. of Law, 2 Ed., Title "Foreign Corporations, Vol. 13, p. 881").

The highest Appellate Court of Kentucky has upheld that position, and we know of no reported case that holds the contrary. Some few cases, in interpreting statutes that do not prohibit the doing of business or declare it to be unlawful, merely imposing a penalty on the agent, which penalty was held to be exclusive and not to affect the contract—have held to the contrary; but no case that we are able to find has ever enforced a contract in one

jurisdiction that was declared to be illegal, unlawful, *unenforceable* or void in another (excepting, of course, in the case of certain statutes that are *contra bonos mores,* like certain slave laws).

A leading case is Ford vs. Buckeye State Ins. Co., 6 Bush (Ky.), 133; 99 Am. Dec., 663. That action was on premium notes given in Indiana to a non-complying agent. The Indiana statute required every agent of a foreign insurance company to file a certificate, and enacted that "such foreign "corporation shall not enforce, in any courts of this "State, any contracts made by their agents * * * "*before* a compliance by such agents * * * with "the provisions of § § 1 and 2 of this Act," and a non-complying agent might be fined $50. The syllabus states:

"1. Contracts not *enforceable* in the State where "made will not be *enforced* in another State.

"2. Contracts of insurance executed in Indiana "by foreign insurance companies in violation of the "laws of, and *not enforceable* in Indiana, *will not* "*be enforced* by the courts of Kentucky. * * *

"3. * * * That as Ferry (the agent) had "failed to comply with the requirements of that "statute, *the contract could not be enforced by a* "*suit on the premium notes in Indiana and there-* "*fore the courts of Kentucky should not enforce* "*said contracts by* rendering judgment for the "amount of such premium notes." * * *

In the opinion it is said: "It is insisted, however, "for the appellees, that if said contracts could not "be enforced in the courts of Indiana, the notes "were nevertheless not absolutely void, and the ap- "pellees were entitled to a recovery upon them in "the courts of this State, notwithstanding the pro- "hibition of the Indiana statute. But it is a gen- "eral rule, applicable to the invalidity of contracts,

"that if void or illegal by the laws of the place of "the contract, they are generally held void and ille- "gal everywhere. Story on Conflict of Laws, § 243. "And where a contract is declared void, *or shown to "be illegal* by the law of the State or country where "it is made, it cannot ordinarily be *enforced* as a "valid contract in any other country: Hyde v. "Goodnow, *supra;* and unless to be performed in "some other country where the contract would be "legal, which does not appear in this case, such "contracts are universally held to be void."

The Court says in Hoyt v. Thompson, 5 N. Y., 320, at page 340: "It is well settled that a foreign "corporation may sue in the courts of this State; "and equally well settled that such suit is allowed "only by the comity existing between one State or "country and another (Bank of Augusta v. Earle, "13 Pet., 590, 591). But what kind of comity can "that be called which allows a foreign corporation "to sue here, in violation of the law of the State in "which it was created? A corporation not allowed "to sue in its own State, certainly cannot be al- "lowed, by the friendly courtesy of another, to bring "its action there. The comity which allows a for- "eign corporation to sue in ordinary cases would "forbid it in a case like the present."

In E. F. Kerwan Mfg. Co. v. Truxton, 44 Atl., 427, at page 430, the Court says: "Comity requires "us to refuse to aid them in any attempt to nullify "the laws of their own State. In Bagby v. R. R. "Co., 86 Pa. St., 291, where a receiver of a corpor- "ation had been appointed by a court of competent "jurisdiction in another State * * * the Court "said that the allowance of such attachment would "be 'to infringe comity we owe to the acts of their "'(the attaching creditors') own Courts within "'their jurisdiction. Instead of comity, this would- "'be unfriendliness, for they ask us to aid them in "'the violation of their own laws.' In Bacon v. "Horne, 123 Pa. St., 452, 16 Atl., 794 * * * the "Court say: 'The plaintiffs come into this State

"'to obtain an advantage by our law which they "'could not obtain in their own. They are seeking "'to nullify the law of their own State, and ask "'the aid of our Court to do so. This they cannot "'have. If for no other reason it is forbidden by "'public policy, and the comity which exists be-"'tween the States.' Richardson v. Forepaugh, 7 "Gray, 546, and Gilman v. Ketcham, 84 Wis., 60; "54 Mo., 395 are to the same effect."

A greater degree of comity should exist between the States of the Union than between foreign nations (Bank v. McLeod, 38 Ohio St., 174, 1843, 184).

If we interpret correctly the opinion of Judge Garrison in the Supreme Court (p. 16 of "Addition"), he broadly intimates that these demurrers would have been overruled if the question of comity had been pressed upon the argument, and the New Jersey Court of Errors and Appeals was asked to overrule these demurrers upon the question of *comity*, even if not on the contention that the contract is void—which contention is still maintained with all confidence.

However, no disclaimer of counsel could change the law of the land.

The quotation made from the brief of counsel for the plaintiffs in error in the opinion of the Supreme Court (p. 16 of "Addition") was not intended to be, and was not a waiver of the question of comity in that Court. It occurred, after the citation of a number of the cases which hold that a contract illegal at the place where it purported to be made, was not legal anywhere. This principle seems to us to be quite distinct from that of comity, and the remark was properly made in that connection. The argument for the defendant in error in the Supreme Court was not at all upon the question as to the effect which might be given to these foreign statutes, but to the question whether, on their construction, the contract was void, or whether merely subjected the corporation or its agents to the penalties provided in the act. We ask

the Supreme Court of the United States to hold that the law of comity, when properly invoked, is as binding as a United States statute; that a contract that can *never* be enforced in the forum where entered into, can never be enforced in any other forum; that an unenforceable contract is as much barred as a void contract. We do not, of course, waive the contention that the contract at issue is as much void under the New York as under the Pennsylvania or New Jersey statute.

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POINT IV.

Plaintiff and defendants are not in pari delicto.

Tracy v. Tallmadge, 14 N. Y., 162, 218, is a leading case, and, in opinions covering 56 pages, discusses learnedly several of the points presented on this writ of error. In that case, a banking corporation issues notes "which the corporation was not "authorized to make and was prohibited by statute "from issuing under a penalty." It was held that the notes being prohibited by statute were illegal and void, but that, nevertheless, the plaintiff could recover upon them because "the vender, though a "party to an illegal contract, was not *in pari delicto* "within the rule precluding a recovery against the "vendee."

We take the following extracts from the opinion: "Where the parties to a contract, prohibited by "statute, but not *malum in se*, are not *in pari delic-* "*to*, the Courts may afford the relief to the less "guilty party."

In other words, as far as the bank was concerned, the notes were illegal, because in violation of a statutory prohibition; in the hands of others the notes were good. The statute could be pleaded as *against* the bank, but not *in favor* of it.

THE COURT SAYS (AT PAGE 179): "IT HAS LONG "BEEN SETTLED THAT CONTRACTS FOUNDED UPON AN "ILLEGAL CONSIDERATION OR WHICH CONTEMPLATE "THE PERFORMANCE OF THAT WHICH IS EITHER "*malum in se* OR PROHIBITED BY SOME POSITIVE "STATUTE, ARE VOID. * * * (page 181). Un- "less, therefore, the parties are *in pari delicto* as "well as *particeps criminis,* the courts, although the "contract be illegal, will afford relief where equity "requires it, to the more innocent party. * * *

"But there are other laws which are calculated "for the *protection of the subject* against oppres- "sion, extortion, deceit, etc. If such laws are vio- "lated, and the defendant takes advantage of the "plaintiff's condition or situation, then the plaint- "iff shall recover; *and it is astonishing that the "reports do not distinguish between violation of "the one sort and the other."* * * *

(Page 190) "Where the action is *in affirmance* "of an illegal contract, the object of which is *to "enforce the performance of an engagement pro- "hibited by law,* such an action can in no case be "maintained; but where the action proceeds in dis- "affirmance of such a contract and, instead of en- "deavoring to enforce it, presumes it to be void "and seeks to prevent the defendant from retaining "the benefit which he derived from an unlawful act, "there it is consonant to the spirit and policy of "the law that he should recover."

This case of Tracy vs. Talmudge (14 N. Y., 162) has been expressly approved and its principles re-adopted by the unanimous decision of the New York Court of Appeals in a late volume of its reports (Irwin vs. Curie, 171 N. Y., 409).

In other words, the law as laid down in this leading New York case is that any act prohibited by statute *is absolutely void as against the party prohibited,* but will be enforced in favor of an innocent party who is not prohibited by the statute.

The Alleghany Company "cannot set up as a de- "fense to an action thereon that it is not authorized

"to do business in the State (Pennsylvania or New "York), because of a noncompliance with the statutory requirements" (Am. & Eng. Enc. of Law, 2nd Ed., Title "Foreign Corporations," Vol. 13, p. 878 and many citations). Neither can it take any affirmative action on the prohibited contract, and when the company comes into court and asks the State of New Jersey to enforce a contract, made unlawful either by the statutes of New Jersey, or a sister State, the Courts say: "No, we are open to the "innocent; we are closed to the guilty."

The issue in this action is: whether an offending corporation seeking to enforce a contract *forever* unenforceable in New York and Pennsylvania, can prevail in New Jersey.

POINT V.

The contract is void.

(A.) *Unenforceable contracts are void and vice versa.*

We do not recognize any difference between prohibited, illegal, unenforceable or void contracts. Any difference is metaphysical rather than practical. In law the terms are interchangeable.

As far as this action is concerned, there is no difference between *malum in se* and *malum prohibitum* contracts, because the Allegheny Company is the guilty party and is trying to enforce an illegal contract.

We take the following from the American and English Encyclopædia of Law, Vol. 15, Title "Illegal Contracts," page 932, *et seq*:

"The term 'illegal' sometimes means merely that "it lacks authority of or support from law; but "when applied to contracts, the term, in its techni-

"cal sense, imports a contract violative of common "law or statute law, or of some rule of public policy. "Such contracts have been spoken of as contracts "of 'evil tendency.'

"Strictly, they are not contracts, but rather are "unlawful agreements which are *void in their incep-* "*tion.* * * * The word 'void' when applied to "such contracts, has been said to be used in refer- "ence to the question whether there can be any *legal* "*remedy* upon such contract (*i. e.*, 'void' means 'un- "enforceable')."

(Page 935) "As a general rule, all contracts or "agreements which involve or have for their object "a violation of the law, are illegal. If the contract "stands opposed to the common or statute law, "it is equally void *ab initio* in the one case as in the "other, and no action or suit will lie to enforce "it. * * *

(Page 938) "The question in regard to the "legality of contracts in violation of law has chiefly "arisen in cases in which the contract involved or "violated some statutory prohibition. * * *

(Page 939) *Malum prohibitum* and *malum in se.* "In some early cases a distinction was taken, in "reference to the validity and enforcement of con- "tracts, between acts *mala prohibita* and acts *mala* "*in se*; but, in the words of an eminent jurist, this "'has long since been exploded. It was not founded "upon any sound principle, for it is equally unfit "that a man should be allowed to take advantage "of what the law says he ought not to do, whether "the thing be prohibited because it is against good "morals, or whether it be prohibited because it is "against the interest of the State.'"

See also Pullman Palace Car Co. vs. Central Transportation Co., 65 Fed. Rep., 164, where it is said: "It seems to be true that the distinction be- "tween *malum prohibitum* and *malum in se* (which "never had the support of just reason) has disap- "peared."

Curtis vs. Leavitt, 15 N. Y., at page 243, says:

"These bills of exchange, being payable on time, "were prohibited by the act of 1840, and were, "therefore, void."

(Page 239) "But there is, in my judgment, a "distinction between the acts of a corporation, in- "nocent in themselves, which are illegal because ex- "pressly prohibited by some positive law, and sim- "ilar acts which are void merely because they are "beyond the corporate powers of the corporation. "Illegality cannot, with grammatical propriety, be "applied to the latter. *Such acts are void because "unauthorized.* They are not strictly illegal, be- "cause not expressly prohibited by law." * * *

"It is conceded that such a contract is void, and "cannot be enforced against the corporation. * * *"

(Page 244) "The test, whether a demand con- "nected with an illegal transaction is capable of be- "ing enforced at law, is whether the plaintiff re- "quires any aid from the illegal transaction in es- "tablishing his case" (Citations).

In Leavitt vs. Palmer, 3 N. Y., 19, it was held that notes issued in violation of a statutory prohibition were void.

Tracy vs. Talmadge, 14 N. Y., 162, at page 190, says: "Where the action is in affirmance of an ille- "gal contract, the object of which is to *enforce* the "performance of an agreement *prohibited by law,* "such an action can in no case be maintained; but "where the action proceeds in disaffirmance of such "a contract, and instead of endeavoring to enforce "it, presumes it to be void and seeks to prevent the "defendant from retaining the benefit which he de- "rived from an unlawful act, there it is consonant "with the spirit and policy of the law that he should "recover. * * *

"The illegal contract itself is, of course, void, and "no part of it can be enforced." * * *

(Page 211, quoting Lord Mansfield): "In Eng- "land, tea, which has not paid duty, is prohibited, "and if sold there the contract is *null and void;* but "if sold and delivered at a place where it is not pro-

"hibited, as at Dunkirk, and an action is brought "for the price of it in England, the buyer should be "condemned to pay the price, because the original "contract was good and valid."

We take the broad ground that any contract prohibited by statute, or illegal, or unenforceable in a court of law in the State where made, is *ipso facto* void and unenforceable everywhere. In law "void" connotes "unenforceable."

(B) The present New York statute merely reaffirms the common law, i. e., under the common law any contract repugnant to the common law or any statute, was unenforceable and void.

Oneida Bank vs. Ontario Bank, 21 N. Y., 490, says: "There is, no doubt, *a principle of the com-* "*mon law,* that illegal and prohibited contracts are "void, without being so expressly declared by any "statute."

(Page 496) "There is no rule of ethics or prin- "ciple of the common law, against the issue of time "obligations by banks or bankers. The offence is, "therefore, precisely of the nature, form and pro- "portions which the Legislature have de- "clared. * * *"

(Page 498) "Now, although they are void, be- "cause in a form prohibited by law, so that no ac- "tion can be maintained upon them, they are still "capable of being used as evidence."

In Bell vs. Leggett, 7 N. Y., 178, the Court says: "All contracts or agreements which have for their "object anything which is repugnant to justice, or "against the general policy of the common law, or "contrary to the provisions of any statute, *are void.*"

Exactly the same language is used in Grey vs. Hook, 4 N. Y., 449, at page 456, quoting from Comyn.

Browning vs. Marvin, 100 N. Y., 144, was an action on a claim assigned to an attorney, and the Court says, at page 149: "The statute expressly

"forbids such a purchase when the prohibited pur-"pose is attempted to be accomplished, either di-"rectly or indirectly, by the attorney in person or "through the agency of another; and no cause of "action can arise out of a transaction thus prohibit-"ed. Wetmore vs. Hegeman, 88 N. Y., 73; Baldwin "vs. Letson, 2 Barb. Ch., 306."

Oishei vs. Lazzaronne, 15 N. Y. Supp., 933, also related to the statute against champerty and maintenance, and Judge MACOMBER said: "That no "cause of action can arise out of a transaction thus "prohibited by statute is such a plain proposition as "hardly to require the citation of authority to sup-"port it" (Citations).

And in the very old case of Nellis v. Clark, 20 Wend., 24 (1838), the Court says: "If, from the "plaintiff's own stating or otherwise, the cause of "action appears to arise *ex turpi causa* or the trans-"gression of a positive law of this country, there "the Court says he has no right to be assisted. It "is upon that ground the Court goes; not for the "sake of the defendant, but because they will not "lend their aid to such a plaintiff."

In Hunt v. Knickerbocker, 5 John. Rep., 327 (1810), the Court says: "No case, I believe, can be "found where an action has been sustained, which "goes in affirmance of an illegal contract; and "where the object of it is to enforce the perform-"ance of an engagement prohibited by law. Wher-"ever an action has been sustained against a party, "to prevent him from retaining the benefit derived "from an unlawful act the action proceeds in dis-"affirmance of the contract; and instead of endeav-"oring to enforce it presumes it to be void (2 Bl. Rep., 1073; Cowp., 197, 79P, 1 H. Bl., 65)."

The present New York statute is in affirmance of the common law, that any contract prohibited by statute is unenforceable and void. The old New York statute (interpreted by 155 N. Y., 373) was in derogation of the common law, and was repealed

on that account and for the express purpose of superseding 155 N. Y., 373.

(C) *This contract is void under the New York, New Jersey and Pennsylvania statutes.*

We are aware that there have been some conflicting opinions—principally in Colorado and the Dakotas—in interpreting this particular class of prohibiting statutes, but there has been no conflict in the decisions of Pennsylvania, New Jersey or New York under the present statute. In each State the contract is unenforceable and void. A few United States Courts have enunciated certain principles, when interpreting certain weak statutes, that have led to confusion and we ask the United States Supreme Court to bring order out of chaos.

The contract in question is either void, illegal, invalid or unenforceable; and for our purposes we do not need to draw any nice distinctions as to differences in definition. When the Alleghany Company attempts to obtain affirmative relief on a contract, entered into in violation of law, and made while doing business that is expressly declared by statute to be unlawful, such contract is, *as to the Alleghany Company*, void, unlawful and illegal, and cannot be enforced in any jurisdiction recognizing international comity.

As already suggested, what statute will constitute an act (that is *malum prohibitum*), void, unlawful or illegal will depend somewhat upon the prohibiting statute, and it is needless to say that, interpreting the various statutes under consideration, there have been conflicting decisions as to just how far each particular statute has gone in rendering the contract void or unenforceable. We take the following from the American and English Encyclopedia of Law, 2nd Ed., Title, "Foreign Corporations," Vol. 13. At page 875 it says: "Accord-"ing to some decisions if the statutes expressly de-"clare that it *shall be unlawful to do business*

"without complying with their requirements, non-
"complying corporations cannot enforce any con-
"tracts made in the domestic state. *As to them at*
"*least* such contracts are void."

(Page 876) Certain "decisions hold that if a
"*penalty* is imposed by statute for non-compli-
"ance, it must be deemed exclusive of all others.
"If the penalty is deemed sufficient by the Legisla-
"ture to effect its object the Court cannot enlarge
"it" (See the Colorado statute).

"While the view just stated is probably sup-
"ported by the weight of authority there are, never-
"theless, many decisions which are in direct con-
"flict therewith, *at least so far as the right of the*
"*corporation to enforce such contracts is concerned.*
"In one of these last mentioned decisions (Dudley
"v. Collier, 87 Ala., 433), the Court said that even
"when a statute goes no further than to impose a
"penalty for the doing of an act, a contract founded
"on such act as a consideration is *void,* although
"the statute does not pronounce it void or expressly
"prohibit it. * * * "

(Page 877) "In a number of decisions it is held
"that a statute merely prohibits the doing of
"business *before a compliance* with its conditions,
"and imposes no penalty for a violation thereof,
"contracts made by such corporations before com-
"pliance are VOID *and not enforceable by them.*
"These decisions proceed upon the theory that if
"no penalty is provided for the violation of a stat-
"ute the only construction that can give any effect
"to it is to hold contracts void."

(The Encyclopaedia then refers to those cases which only suspend the remedy until compliance.)

(At page 878 it discusses the fact that the corporation cannot set up its own violation of law as a defense.)

(Page 880) "Ii the statutes imposing conditions
"expressly declare that no suits shall be brought on
"a contract or obligation made in violation thereof,
"THERE CAN BE NO ROOM FOR ANY OTHER CONSTRUC-

"TION than that the contract will be VOID *so far as "the right of the corporation to enforce it is con- "cerned."*

To sum the matter up:

Whatever decisions there may be in relation to ineffective statutes which merely impose a penalty without tainting the contract, or which merely *postpone* enforcement until certain conditions are complied with, "there can be no room for doubt" that in every decision construing statutes as effective as those of Pennsylvania and New York, where the business transacted is expressly (1) prohibited, (2) declared to be unlawful, (3) is unenforceable in the courts, and (4) a penalty is inflicted upon the agent, such a contract is void, unlawfully, illegal and unenforceable at home and abroad "so far as the "right of the corporation to enforce it is concerned," as in the demurrers at issue.

The selling of lumber to Allen & Co., at Scranton, Pa., or at New York City, and the accepting of a note in payment therefor at Scranton or New York was "doing business in Pennsylvania or in "New York." Under the admissions of the demurrers, the cause of action arose in Pennsylvania and New York, and such "doing business" is expressly declared by statute to be prohibited and unlawful. There can be no possible question that this contract is void in so far as its enforcement by the Alleghany Company is concerned.

Whether it would be void in an action by Allen & Co. for specific performance is wholly another question, with which we do not have to deal, for the prohibiting act does not deal with the citizen. It was unlawful for the Alleghany Company to sell the lumber. It was not unlawful for Allen & Co. to buy it.

If the Court should wish to go into this matter further it is respectfully referred to the following propositions and authorities: (The next point will be found at page 43.)

See
Wiesbock Co. vs Normile Co
94 Atl. Rep. 52. June 1915

First proposition:

Where foreign corporations undertake to transact business in States where, by statutes, it is declared to be unlawful to do so without complying with their requirements, non-complying corporations cannot enforce any contracts made in said States. As to them, such contracts are void: Franklin Ins. Co. v. Louisville, &c., Co., 9 Bush. (Ky.), 591; Union C. L. Ins. Co. v. Thomas, 46 Ind., 44; Stewart v. Northampton Mut., &c., Ins. Co., 38 N. J. L., 436; Farmers, &c., Ins. Co. v. Harrah, 47 Ind., 236; Western Massachusetts Mut. Fire Ins. Co. v. Girard P. S. Co., 19 Pa. Co. Ct. Rep., 113; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn., 587; N. Y. Bldg. Ass'n v. Cannon, 99 Tenn., 344; Barber v. Boehm, 21 Nebr., 450; Seamans v. Christian Bros. Mill Co., 66 Minn., 205; Williams v. Saullin, 59 Mo. App., 30; Lycoming F. Ins. Co. v. Wright, 55 Vt., 526; Jones v. Smith, 3 Gray (Mass.), 500; Williams v. Cheney, 8 Grey (Mass.), 206; Christian v. American F. L. M. Co., 89 Ala., 198; Cincinnatti Mut. H. Ass'n v. Rosenthal, 55 Ill., 87; Ehrhardt v. Robertson, 78 Mo. App., 404; State v. Bridgge, 116 Ind., 55; Pennington v. Townsend, 7 Wend. (N. Y.), 276; Aetna Ins. Co. v. Harvey, 11 Wisconsin, 394; Lasher v. Stimson, 145 Pa. St., 30, 23 Atl., 552.

Second proposition:

A contract of a non-complying corporation is void even if the statute goes no further than to impose a penalty for the doing of an act, where the contract is founded on such act as a consideration, although the statute does not pronounce it void or expressly prohibit it (Dudley v. Collier, 87 Ala., 433; Aetna Ins. Co. v. Harvey, 11 Wis., 394).

Third proposition:

Contracts of non-complying corporations are void if the statute contains a prohibition, but imposes no penalty. British Columbia Bank v. Page, 6 Oregon, 431; *In re* Comstock, 3 Sawy (U. S.), 218; Hackeny v. Leary, 12 Oregon, 40.

Fourth proposition:

Where statutes imposing conditions expressly declare that no suit shall be brought on a contract or obligation made in violation thereof, the contract will be void so far as the right of the corporation to enforce it is concerned. New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co., 25 Wend. (N. Y.), 648; National Bank v. Phoenix Warehousing Co., 6 Hun (N. Y.), 71; De Groot v. Van Duger, 20 Wend. (N. Y.), 390; Taber v. Interstate Bldg. Assn., 91 Tex., 92.

Fifth proposition:

If a contract by a foreign corporation is *not enforceable* in the State where made, because of a non-compliance by the corporation with the statutory conditions precedent to doing business in the State, by comity, the contract will not be enforced by the Courts of another State. Ford v. Buckeye State Ins. Co., 6 Bush. (Ky.), 133; Haverhill Ins. Co. v. Truxton, 44 Atl., 427; Hoyt v. Thompson, 5 N. Y., 320; Runk v. St. John, 29 Barb., 585; Hurd v. City of Elizabeth, 41 N. J. L., 1; Bagby v. Railroad Co., 86 Pa. St., 291; Ins. Co. v. Wright, 55 Vt., 526; Bank v. McLeod, 38 Ohio St., 174; Hunt v. Insurance Co., 55 Me., 290; Metzner v. Bangs, 98 Ind., 425; Stockbridge v. Beckwith, 6 Del., Ch. 72.

Wilgus on Private Corporations, at page 1512 (1902), collates the cases in different States:

"(1) When there is a penalty:

"(a) The contract is void (citing cases, "New York, Pennsylvania and New Jersey).

"(b) Contracts are not void (citing no case "in New York, New Jersey or Pennsylvania).

"(2) When there is no penalty (no citations "from New York, Pennsylvania or New Jersey)."

We will consider, in order, the cases set forth in the opposing brief at the Court of Errors and Appeals:

1. *Kindel* vs. *Beck & P. L. Co.*, 35 Pacific Rep., 538 (amount involved $7.73). This is a decision of the Supreme Court of Colorado construing its own statute, which merely imposed a penalty on the agent. The Colorado Courts universally have held that under their statute the penalty was exclusive, and that their statute in no way affected the contract itself.

This case also holds that all statutes requiring a foreign corporation to file a certificate are unconstitutional, as interfering with interstate commerce. That this is not good law is too elementary to be discussed. The highest Courts of the different States and of the United States have held to the contrary; but see *Fritz* vs. *Palmer*, 132 U. S., 282; *Cooper Mfg. Co.* vs. *Ferguson*, 133 U. S., 727, 732, where the constitutionality of these laws is expressly upheld.

2. *Denning* vs. *State ex rel., &c.*, 23 Ind., 416. In this case an innocent *bona fide* holder of a second mortgage made by a State officer, in violation of a law which permitted State funds to be invested in first mortgages only, sought to foreclose. The Court holds: "The general rule is that the Courts "will not enforce contracts prohibited by statute. "* * * but the parties will be left without rem-"edy whenever they are in *pari delicto*. But this

"rule is not applicable where the contract is pro-
"hibited for the mere protection of *one* of the par-
"ties against an undue advantage which the other
"party is supposed to possess over him."

3. *American Insurance Co.* vs. *Wellman*, 69 Ind., 413 (Circuit). The Court held that the Indiana statute (like the old New York statute) merely *suspended* the remedy until the statute was complied with, and the answer demurred to was held good. The Indiana cases invariably hold their statute to be a good plea in abatement, and that the corporation cannot recover until the certificate is filed.

4. *Crefeld Mill* vs. *Goddard*, 69 Fed. Rep., 141 (U. S. Circuit, Southern District of New York). This case construes the old New York statute, and holds that it merely suspended the cause of action until the foreign corporation complied with the statute. The plaintiff had secured the certificate before action. Judge WALLACE says expressly at page 142: "Were it not for the last clause of the "section (since amended) undoubtedly *such con-*
"*tracts would be void*, because they would be in-
"cluded in the general prohibition against doing
"business within the State." He also says: "The
"phraseology of these statutes (similar statutes of
"other States) differs so materially from that of the
"present statute that the decisions of the Courts in
"construction of their provisions are of no material
"assistance in the present case." This opinion is an instructive brief, and there is no room for doubt that Judge WALLACE would construe this contract as absolutely void, or unenforceable, as far as the corporation is concerned, under the present New York statute.

5. *Carson Rand Co.* vs. *Stern*, 129 Mo., 381. This case construes the Missouri statute where the plaintiff had complied with the law after suit brought,

but before motion to dismiss. This case turns upon the meaning of the word "maintain" and construes the statute to read like the old New York statute.

6. *Northwestern Mutual Life Insurance Co.* vs. *Overhold,* 4 Dillon, 287 (U. S. Circuit, 1876). This case construes the Colorado statute, and holds affirmatively that other State statutes rendered the contracts void, but that the Colorado statute does not, any more than failure to publish a list of officers would invalidate a contract (See bottom page 289).

7. *Fritz* vs. *Palmer,* 132 U. S., 282. This case also construes the Colorado statute and follows the State decisions. It discusses the peculiarity of the Colorado statute at length.

Inasmuch as the Colorado statute at that time contained nothing but a penalty upon the officers, it was held that it had no more effect upon a contract than though the statute had required the company to publish annually a statement of assets.

8. *Pennypacker* vs. *Capital Insurance Co.,* 80 Iowa, 56, held every position maintained by plaintiffs in error, *i. e.,* that the prohibited insurance contract was *void to the company,* but enforceable by the innocent policy holder (See pages 60, 63).

9. *Watrous* vs. *Blair,* 33 Iowa, 58, is to the same effect.

10. *Nat. Bank of Genessee* vs. *Whitney,* 103 U. S., has no application.

11. The *Walter A. Wood Moving Co. vs. Caldwell,* 54 Ind., 276 (U. S. Circuit), construed the Indiana statute, and holds that its intent is merely to postpone the enforcement of contracts until compliance, *i. e.,* this statute is like the old New York statute.

12. *Jarvis-Conklin, &c., Trust Co.* vs. *Willhoit*, 84 Fed. Rep., 514, construes a Tennessee statute similar to the Colorado statute.

13. *Chattanooga R. & C. R. Co.* vs. *Evans*, 66 Fed. Rep., 809, ditto.

14. *Chase's Patent Elevator Co.* vs. *Boston Towboat Co.*, 152 Mass., 428, holds that a certain Massachusetts statute merely makes the stockholders individually liable. It does not apply to this case.

15. Thompson's Commentaries on Laws of Corporations, §§ 7950 to 7970, discuss the whole question. The two sections quoted in the brief have no particular application to this case.

16. *McBroom* vs. *Scottish American Land Investment Co.*, 153 U., 318, merely construes a New Mex. statute on usury.

The only other case cited is *Sullivan* vs. *Beck*, 27 Fed. Rep., 200 (District Court, Indiana). This was an action to foreclose a mortgage made three years before the Indiana statute was passed. The District Judge uses some loose language that is not sustained by his citations. This is the only case that we have found that in any way sustains the contention of the defendant in error, and the application of the law to the facts of that case was probably correct, but the loose language of this single Judge has never been followed.

Why are there no citations from the reports of N. J., Penn. or N. Y., under the present statute?

No case can be found in the reports of any State, or of the U. S., construing a statute similar to that of Penn. or N. Y., where the contract was not held to be void as to the Co. when it attempts to enforce it.

We might cite from literally scores of cases where the courts have held that the contract was void in

relation to the foreign corporation; and of this much we are certain—that no case can be found in any State interpreting a statute similar to that of Pennsylvania or New York, which enforces a contract in one State which could not be enforced in the State where the contract originated. We might quote indefinitely from cases where these contracts have been held to be absolutely void, *when attempted to be enforced by the corporation,* and this is the only proposition that we have to sustain on this appeal.

This question is settled in the State of New Jersey. In Stewart v. Northampton L. S. Co., 9 Vroom, 439, the Court construed an act to regulate the business of insurance, which act is not substantially different from the Pennsylvania statute. It provides, as does the Pennsylvania statute, that "*it shall not be lawful* for any person" to take insurance. The Court held that a non-complying foreign insurance company cannot recover for assessments levied against an insured. This case was affirmed in Northampton Mutual Live Stock Co. v. Stewart, 10 Vroom., 486.

In Columbia Fire Insurance Company v. Kinyon, 8 Vroom., 33, Mr. Justice Van Syckel, after discussing the statute above quoted, and another act of similar import, says at page 37: "The agent, there-"fore, who acts without due authority, is not only "liable to the penalty in such case prescribed, but "the contract made in contravention of the law "is itself *void, so far as concerns the right of the "foreign principal to sue upon it.*"

In Goldmark v. Magnolia Metal Co., 47 Atl. Rep., 720, N. J., the Chief Justice, in speaking of the status of foreign corporations which had not complied with Section 97 of our corporation act, said: "The Legislature prescribed the conditions under "which the foreign corporations comprised within "the statute shall be allowed to transact business "in this State. Such corporations not having com-"plied with the statute are doing business within

"the State under a legislative interdict. They are, "therefore, corporations not recognized by this "State, and are disqualified from claiming that the "business carried on by them is *lawfully* trans- "acted.

The citation of cases which have held that contracts entered into by non-conforming foreign corporations were absolutely void *as far as they were concerned might be multiplied.* We make a few selections:

Williams v. Cheney, 3 Gray, 215, was an action upon an insurance note given under similar circumstances. In his opinion in that case, Bigelow, J., after referring to the Massachusetts statutes and the company's failure to comply therewith, said: "The consideration of the notes was, therefore, a "contract on the part of the insurance company, "made through their agent, which he was *prohib-* "*ited* from making by the statutes of this Com- "monwealth. Under these circumstances, it is very "clear, upon the well settled doctrine in this Com- "monwealth, that the *payee* of the notes could main- "tain no action upon them. The contract of insur- "ance having been made in direct violation of the "statutes of this Commonwealth, the consideration "of the notes was *illegal,* and they could not be en- "forced *in the hands of the original party* (Wheeler "v. Russell, 17 Mass., 258). Courts of justice will "not lend their aid to carry into effect contracts en- "tered into by parties with a view of accomplishing "anything which is *prohibited* by law."

In Wheeler v. Russell, 17 Mass., 258, the action was brought on a promissory note, the consideration for which was the sale of shingles not of the size prescribed by statute. The statute expressly prohibited the sale of shingles not of the statutory dimensions, under the penalty of forfeiture. The action was successfully defended under the general rule that where the undertaking upon which the plaintiff relies, was either upon an unlawful consideration, or to do an unlawful act, the contract is

void; and this whether the contract be illegal, as being against the rules of the common law, or the express provisions or general policy of any particular statute. The arguments of counsel are fully reported and contain an exhaustive citation of authorities. At the conclusion of the argument the Chief Justice observed that the case had been so elaborately argued on both sides, and the points and authorities so thoroughly displayed that it was quite unnecessary for the Court to go into a formal discussion of the case. They were all of opinion that the shingles, for the price of which the note in suit was given, having been sold in direct violation of the statute, the consideration of the promise was clearly illegal, and insufficient to support it. No principle of law, his Honor added, is better settled than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law.

In Cincinnati Mutual Health Assurance Company v. Rosenthal, 55 Ill., 85, the action was brought upon a note given to the appellant for stock in the company, and for premium. The statute of Illinois provided that it should not be lawful for any agent or agents of any insurance company incorporated by any other State than that, to directly or indirectly take risks or do or transact any business of insurance in that State, without first procuring a certificate of authority from the Auditor of State. In its opinion, the Court said: "The note was made and delivered, "and the policy given and the contract consum- "mated in this State, in defiance of a law which "is so plain in terms that it can bear no construc- "tion, and which no one can misunderstand, de- "claring all such contracts *unlawful*. It says, *it "shall not be lawful* for any such agent, directly "or indirectly, to take risks, or transact any busi- "ness of insurance in this State, *until* they com- "ply with the terms prescribed in that act. To "permit the company, when they admit that they

"have disregarded all of these requirements, to re-
"cover, would be for the courts to disregard the
"clearly expressed will of the general assembly, and
"to say what it has said shall be unlawful, is and
"shall be lawful and binding. *To enforce the pay-*
"ment of this note would be, virtually, to repeal a
"plain enactment of the Legislature. When the Leg-
"islature *prohibits* an act, or declares that it shall
"be unlawful, to perform it every rule of interpre-
"tation must say that the Legislature intended to
"interpose its power to prevent the act, and, as one
"of the means of its prevention, that the Courts
"shall hold it *void.* This is as manifest as if the
"statute had declared that it should be void. To
"hold otherwise would be to give the person, or
"corporation, or individual, the same rights in en-
"forcing *prohibited* contracts, as the good citizen
"who respects and conforms to the law. To permit
"such contracts to be enforced, if not offering a
"premium to violate a law, it certainly withdraws
"a large portion of the fear that deters men from
"defying the law. To do so, places the person who
"violates the law on an equal footing with those who
"strictly observe its requirements. That this con-
"tract is *absolutely void* AS TO APPELLEE, *we enter-*
"tain no doubt. (See Munsell v. Temple, 3 Gilm.,
"93.) That Courts may have held, that when a
"statute has prohibited the doing of an act, and im-
"posed a penalty simply, the act was not void, may
"be true, but we doubt the correctness of such a con-
"struction. That the Legislature imposed, by a
"subsequent section of the act, a penalty for the
"violation of the provisions of the law, does not,
"in the remotest degree, legalize or give validity to
"the note. It but shows that the general assembly
"intended to adopt such measures as should compel
"the observance of the law. Had no penalty been
"provided, no one would have, for a moment, hesi-
"tated to say, that the note was, under this law, ut-
"terly void; and if so, why should we hold, that the
"imposition of the penalty alters, or changes in the

"slightest degree, the previously declared will, that "the act should be unlawful. In the case of Bens- "ley v. Bignold, 5 Barn. & Ald., 335, where a printer "had brought an action to recover for the price of "paper furnished, and printing a pamphlet entitled "'An Elucidation of the System of Fire and Life "Insurance,' it was held, that a recovery could not "be had, because the name of the printer, the place "of his abode, and the place where printed, were "omitted from the front page of the pamphlet, con- "trary to an Act of Parliament which prescribed a "penalty of £20 for such omission. In the case of "Law v. Hodgson, 2 Camp., 147, it was held that a "person selling bricks under the statutable size, "who thereby forfeited a penalty of twenty shill- "ings, could not recover for them. This case is also "reported in 11 East, 300. In the case of Langton "v. Hughes, 2 Maule & Selw., 593, it was held that "a druggist who sold drugs to a brewer, knowing "they were to be used contrary to the statute, in "manufacturing beer, could not recover. And Lord "Ellenborough places it upon the ground that the "statute was designed to protect the public health "and the *public revenue*. And Leblanc said, in de- "livering his opinion, that it 'is an established prin- "ciple, that the Court wil not lend its aid in order "to enforce a contract entered into with a view of "carrying into effect anything which is prohibited "by law.' It has been held, that where a person "sells goods, knowing that they are intended to be "smuggled, he is not permitted by the policy of the "law to recover on such a contract. Briggs v. Law- "rence, 3 T. R., 454; Clugus v. Punckham, 4 T. R., "466; Waymell v. Reid, 5 T. R., 599: In the decision "of these cases, a number of other adjudged cases "are referred to, which support and illustrate the "rule. And Wheeler v. Russell, 17 Mass., 258, is to "the same effect. Many other decisions could be "referred to in support of the doctrine, were it "deemed necessary. This contract on the part of "the insurance company is against the manifest

"policy of the law, *is expressly made unlawful by "the statute, and prohibited. It is, therefore, void, "and of no effect.*"

In re Comstock, 3 Sawyer, 218, contains an elaborate and able discussion of the cases on this subject and with the same result. To the same effect are Semple v. Bank of British Columbia, 5 Sawyer, 88; Rising Sun Insurance Co. v. Slaughter, 20 Ind., 520; Hoffman v. Banks, 41 Ind., 1; Union Central Life Insurance Co. v. Thomas, 46 Ind., 44; The Farmers and Merchants' Ins. Co. v. Harrah, 47 Ind., 236; Seaman v. Temple & Co. (Mich.), 63 N. W. Rep., 408; Seaman v. Zimmerman (Iowa), 59 N. W., Rep., 290; Pennsylvania Co. v. Bauerle (Ill.), 33 N. E., Rep., 166.

In Aetna Insurance Co. v. Harvey, 11 Wis., 394, it was held that "an action cannot be maintained "by a foreign insurance company upon a contract "made with the company, unless the company, has "complied with the provisions of the statute, by "making the statement of its condition, as required, "before entering into the contract. A statute which "imposes a penalty for doing an act except as "prescribed, amounts to a prohibition to do the act "otherwise, and a contract for its performance is "*void.*"

In the opinion of the Court, it is said: "It was "claimed for the plaintiff in error, that inasmuch "as the statute does not say that any policy is- "sued or note taken in violation of its provisions, "should be void, that, therefore, they should not "be so held. And that the only effect the law "would be to render the agent liable to prosecu- "tion for violating it, or to an action for damages. "But we do not see how this position can be sus- "tained, in view of the well established rule of law, *"that a contract made in violation of its statute is "void and that Courts will never lend aid to its en- "forcement.* In addition to the authorities cited "by the defendant in error, the following may be "referred to upon this point: Brackett v. Hoyt, 9

"Foster, N. H., 267; Buzton v. Hamblen, 32 Maine, "448; Bancroft v. Dumas, 21 Vt., 456; Boutwell v. "Foster, 24 *id.*, 485; Gigson v. Service, 5 Taunt., "433; 5 Barn. & Ald., 335, 2 Camp., 144, 147. And "we did not understand the counsel for the plain- "tiff in error as disputing this rule, but claiming "rather that the intent of the statute was not to "render the contracts, if made, *invalid, but only "to punish the agent.* But it seems to us that its "clear intent was to prohibit the transaction of busi- "ness by foreign or domestic insurance companies "until they had complied with its provisions. The "authorities above cited *abundantly establish* that "even where *a penalty only is imposed* for doing an "act, that amounts to a prohibition, and a *contract "for its performance is void.* And where the thing "is *positively prohibited, then* ALL AGREE that the "contract is void, and there can be no queston that "the transaction of insurance business in this State "by the agents of foreign companies, *before* the com- "pliance with its provisions, is positively prohibited. "It says expressly, that *it shall not be lawful* for "the sworn statement of its officers, on filing which "its agents are authorized to do business. And when "we consider this prohibition, and the fact that a "foreign corporation could not act in this State, "except by its agents, and that the agents are ex- "pressly prohibited, there seems no room to doubt "that the intention of the statute was to entirely "prohibit the transaction of any insurance busi- "ness in this State, until the provisions of the act "had been complied with; and this being so, the is- "suing of the policy and taking the note sued on "was a violation of the law, and the company can- "not sustain the action. It is not necessary that the "law should expressly say that a contract in viola- "tion of it shall be void; *it is sufficient for it to pro- "hibit it, and its invalidity follows as a legal con- "sequence."*

In Cary-Lombard Lumber Co. v. Thomas, 22 S. W. Rep., 743, the Supreme Court of Tennessee

held that "All contracts made by it and all busi-"ness transacted by it in Shelby County prior to "that date were illegal, and no right of property "or of action could exist in it prior to that date. "It follows that such company can have no remedy "growing out of any transaction before that date "in Shelby County, and can recover upon no con-"tract, express or implied, entered into before that "date, and is not entitled to retake or recover any "materials or lumber furnished prior to that date. "Stevenson v. Ewing, 87 Tenn., 46, 9 S. W. Rep., "230; Heworth v. Montgomery, 91 Tenn., 16, 18 "S. W. Rep., 399."

In Farrior v. New England Mortgage Security Co., 7 So. Rep., 200, the State Constitution provided that "No foreign corporation shall do busi-"ness in this State without having at least one "known place of business and an authorized agent "or agents therein." The Supreme Court of Alabama held that where a foreign corporation engaged in the business of loaning money on mortgages lends money and takes a mortgage therefor in this State in violation of the Constitution, the promise of the mortgagor to pay is void, and a bill to foreclose the mortgage cannot be maintained. In its opinion the Court says: "*Apparent injus-"tice*, it is true, *often follows* from the application "of provisions of this nature, by which contracts "are annulled for illegality, or as obnoxious to "good morals or violative of public policy, or for "repugnancy to positive statutes. But the law does "not allow this result for the benefit of either of "the offending parties as being less censurable or "more favored than the other. It only lets the "parties, who are in equal fault, severely alone, as "the surest mode of securing obedience to the au-"thority of its mandates." In Bartlett v. Vinor, 3 Carth., 252, Holt, C. J., said: "Every contract "made for or about any matter or thing which is "prohibited and made unlawful by any statute is "a *void* contract, although the statute itself does

"not mention that it shall be so, but only inflicts "a penalty on the offender, because a penalty im- "plies a prohibition, although there are no prohib- "iting words in the statute." And in Holman v. Johnson, Cowp., 243, Lord Mansfield said: "No "court will lend its aid to a man who founds his "cause of action upon an immoral or illegal act. "If, from the plaintiff's own showing, or otherwise, "the cause of action appears to arise "*ex turpi causa*, "or the transgression of a positive law, then the "Court says he has no right to be assisted." Applications of this principle have been frequent in the history of English jurisprudence.

To sum the matter up, the notion that a contract attempted to be made in one State, when void by the laws of that State, can be valid elsewhere, is a legal absurdity. The validity of a contract must always be determined by the *lex loci contractus.* For every case that can be found which interprets one of the feeble statutes, like that of Colorado, holding that the contract is enforceable, there can be 20 cases found which hold that any contract made contrary to the prohibition of an express statute is illegal and void, *as to the offending corporation.*

In these days when nearly every prominent corporation extends its business over the different States of the Union and the different nations of the globe, it would lead to inextricable confusion if one State would enforce a contract that another State has declared to be unlawful. The thousands of corporations that have been incorporated under the laws of West Virginia, having neither a director nor a stockholder who has ever been within the confines of the State, and which have never had a dollar's worth of property therein, could do business in every State of the Union, and pay taxes no where on millions of dollars invested, and, when confronted in any one State with the statute which prohibits them from doing business there, could circumvent the law by merely crossing the

border and beginning an action in a neighboring State, or could bring action in a United States Court. It is needless to say that this would soon become intolerable; and we do not believe that the State of New Jersey, which has always shown such liberality in dealing with corporations, both foreign and domestic, should assist in bringing about a state of public sentiment which might ultimately lead to retaliatory statutes which would prevent any foreign corporation from doing any business at all outside of the limits of its creation.

The New York statute prohibited the Alleghany Co. from doing business in New York *prior to* conforming to the statute and closed its Courts *forever* against a contract made in violation of the statute; that made the contract not only unenforceable, but void, not only in New York, but everywhere.

POINT VI.

The opinion of the Supreme Court (p. 15 of "Addition.")

This opinion has not been sustained on any point by the opinion of the Court of Errors and Appeals. It cites no case to sustain its opening proposition that a contract may be "unenforceable at the *locus contractus*" and yet not void elsewhere. The Court holds, apparently, that the demurrers would have been sustained on principles of comity, had not the defendant's attorney disclaimed that point (closing paragraph of Opinion, p. 18).

A careful examination of the printed briefs submitted by the defendants' attorney fails to reveal any such disclaimer, and the question of comity was pressed before the Court of Errors and Appeals.

The Assignments of Error (p. 19 of "Addition")

to Court of Errors and Appeals brought up for review the overruling of the demurrers to the second and third defenses, and the direction of a verdict at Circuit, on the trial of the first and fourth defenses, *i. e.,* all alleged errors both on demurrers and on the trial were reviewed.

POINT VII.

The opinion of the New Jersey Court of Errors and Appeals.

The opinion held by this Court is probably the only one that need be considered in the Supreme Court of the United States. Some of the positions held by it are wholly different from that of the Court below, and were not suggested in any of the respondent's briefs.

(1) In relation to the New York Statute.

(*a*) The contract is "void," but if only "unenforceable" in New York, it should not be enforced in New Jersey.

We think that the syllabus is not sufficiently strong. It states: "A contract void by the laws of "the State where made will not be enforced in this State." This is only a half truth, and is therefore the more dangerous. It seems to make a distinction between void and unenforceable contracts. There is no such distinction. The New Jersey Court nowhere claims that the contract at issue is *enforceable* in New York, now or hereafter; it admits it is not. The Court should have gone further and held: "A contract void or *unenforceable* by the "laws of the State where made, will not be enforced "in this State."

We deem it to be the law that any contract, executed in New York, between citizens of New York, or between a citizen and a foreign corporation, and prohibited by a New York statute, even though not expressly declared to be void, is void, or at least, unenforceable, and any contract unenforceable, now and forever hereafter, in the State of New York, should not be enforced in the State of New Jersey or in the United States Courts.

To hold otherwise would be not only contrary to the law of comity, which is just as binding as any other law, when properly invoked, but it would lead to friction, and, possibly, open hostility between the States. It never was the intent of the Constitution that New York should be so far deprived of its sovereignty that a claim of one of its citizens against another citizen on a contract executed in New York should be prohibited by law and unenforceable at home and yet enforceable in New Jersey, or in the United States Courts at home; and the same principle is applicable to any prohibited act either between citizens of the State of New York or a citizen and a foreign corporation. The State of New York might prohibit one of its citizens from taking usury from another and attach no penalty except that the debt should never be enforced in the Courts of New York. If, then, one of those New York citizens should go to New Jersey on an excursion and there be served with a summons, according to the reasoning of the New Jersey Court, the contract prohibited and unenforceable in New York would be enforceable in Jersey City. There is no avoiding the logic of this reasoning, and unless the Supreme Court of the United States shall forever settle this question, there is bound to be endless friction.

(b) New York Interpretation of New York Law.

The New Jersey Court avoids the real issue by saying that, as the Court of Appeals of New York has never interpreted this new statute, the New

Jersey Courts must assume that the contract is not void, although it admits that it is unenforceable in New York. We answer by saying that statutes are just as mandatory and just as plain as decisions, and that unenforceable and void contracts stand on the same platform.

However, the New Jersey Court of Errors and Appeals is wholly mistaken in its interpretation of the New York law. The first New York statute in force up to 1901, and in force when the case of Neuchatel Asphalt Co. vs. The Mayor, 155 N. Y., 373, was decided, was one of the weakest statutes of any State in the Union. The present statute is one of the strongest, and is wholly different from those of Indiana and Colorado. The first statute merely postponed the collection of the debt until the statute was complied with. The defendant could plead in abatement, but the plaintiff could, at any time, remedy the fault by complying with the statute.

The new statute is wholly different; no act of the company can open the Courts to it. The statute first prohibits the foreign corporation from doing business: "No foreign corporation * * * "*shall do business* in this State," &c.—(That is an absolute prohibition)—without procuring a certificate "that the business of the corporation to be car- "ried on in this State is such as may be *lawfully* "carried on by a corporation incorporated under "the laws of this State." (That prohibition is just as complete as the prohibition against larceny or forgery.)

Now comes the penalty: "No foreign stock corpo- "ration doing business in this State shall *maintain* "*any action* in this State upon any contract made "by it in this State unless PRIOR *to the making of* "*such contract,* it shall have procured such a certi- "ficate," *i. e.,* the penalty is perpetual. The corporation having once offended, can do nothing to remedy its offense. The New Jersey Courts have not claimed that the contract could be enforced in either New York or Pennsylvania.

The character of a prohibition is not determined by the harshness of the penalty. This New York statute, being a part of the tax law (§181 of the "Tax Law," as amended by Chap. 558, Laws of 1901), and intended to assist in collecting revenues to maintain the government, has all the characteristics of a penal statute, viz.: an absolute prohibition—together with a penalty. This statute is part of the machinery of government, and public policy requires it to be construed liberally in favor of the State, and comity requires every State to aid its neighbor in collecting revenues.

The Constitution of the State of New York prohibits gambling and directs the Legislature to pass appropriate legislation for its punishment. The Legislature passed an act making gambling a felony, except where some other punishment was inflicted. However, for bookmaking on certain race tracks it inflicted a different penalty, permitting the looser to recover back his money, *i. e.*, a civil penalty. We may comment on the disproportion of the punishments for the same offence on different sides of a race track fence; nevertheless, the Court of Appeals has declared in People *ex rel.* Sturgis vs. Fallon, 152 N. Y., 1, that the lesser penalty is exclusive and the law constitutional.

We think that the United States Supreme Court will see at a glance that the New York statute is as much a penal statute as is the Pennsylvania statute. The gravity of the penalty—civil or criminal—does not alter the character of the prohibition.

The Court of Errors and Appeals admits that the Pennsylvania courts have declared that a contract made in violation of its statute is void, although the statute does not, in terms, so declare it, but claims that there is no such decision of the New York Court of Appeals, and, therefore, the New Jersey court takes it upon itself to declare the contract not void.

Permit us to call attention to the fact that the only reason why the Court of Appeals has not de-

termined the void character of a contract entered into in violation of this particular statute is because the law is new (1901) and is so plain that no case has ever arisen under it, and is not likely to arise under it for some time to come. An unambiguous statute is just as binding upon the New Jersey court as a decision of the Court of Appeals.

The old, *weak* New York law is "interpreted" by the new, *strong* law. The interpretation of the old law by Neuchatel Asphalt Co. v. The Mayor (155 N. Y., 373) was "re-interpreted" by the new statute. "Block on N. Y. & N. J. Corporations" (1904) says at page 45d: "The following cases *superseded* by "amendment of 1901: 155 N. Y., 373; 12 Misc., 26; "23 Misc., 520; 86 Hun, 319."

The New York Court of Appeals enunciated the law so plainly so many years ago, and has reiterated it so frequently in citing cases, that no New York lawyer would care to test the new statute in the Court of Appeals. The New York decisions are even more pronounced than those of Pennsylvania.

The case of Tracy v. Talmadge, 14 N. Y., 162 (1856), is a leading case, and has been cited time and time again with approval. The opinion of Selden, J., is an admirable brief, and Judge Comstock says of it in Sacketts Harbor Bank v. Robert Codd, 18 N. Y., 240, at page 244, as follows: "No "case ever received a more careful consideration in "this court and the *principles there laid down are "with us no longer open to discussion.* They were "adopted in the fullest manner in the still later case "of Curtis v. Leavitt (15 N. Y., 9)." The opinion in Tracy v. Talmadge says at page 179: "It has long "been settled that contracts founded upon an ille- "gal consideration, or which contemplate the per- "formance of that which is either *malum in se,* or "PROHIBITED BY SOME POSITIVE STATUTE, *are "void."* * * *

"That a contract by a corporation which it has "no legal capacity to make is *void* and cannot be "enforced, it would seem difficult to deny; * * *

"Prior to the case of East Anglian Railway Com-"pany v. Eastern Counties Railway Company (7 "Eng. Law & Eq., 505), the rule which denied all re-"lief, in equity as well as at law, to any party to an "illegal contract, had been generally applied only "to cases where the contract was either *malum in se* "or *specifically prohibited by statute.*"

This case related to certain bank notes, the issue of which was prohibited, and the court specifically held, at page 180, "that the effect of this upon the "contract was the same as if it had been *specifically "prohibited under a penalty.*" A perusal of this very careful opinion will show that since 1856 there has been absolutely no question in the State of New York that any contract prohibited by statute, whether it have a penalty attached to it or not, the contract is absolutely void as against the guilty party, but may be enforced in favor of an innocent party.

If it were necessary to go further, we have simply to quote from Oneida Bank v. Ontario Bank, 21 N. Y., 490, at page 495, where Chief Justice Comstock said: "THERE IS, NO DOUBT, A PRINCIPLE OF "THE COMMON LAW, THAT ILLEGAL AND PROHIBITED "CONTRACTS ARE VOID, WITHOUT BEING SO EXPRESSLY "DECLARED BY ANY STATUTE. * * *"

And the Court held that those acts (p. 498) which in good morals were innocent acts, were void, stating:" Now, although *they are void*, because "in a form prohibited by law, so that no action can "be maintained upon them, they are still capable of "being used as evidence."

There can be no question whatever that the Court of Appeals of the State of New York has, for nearly fifty years, held in the strongest possible language that any acts prohibited by the Legislature, even so innocent an act as the issuing of time loans by a bank and to which no penalty was attached, are *malum prohibitum* and absolutely void as against the guilty party.

The New Jersey Court seemed to rely upon Neu-

chatel Co. vs. The Mayor, &c., of the City of New York, 155 N. Y., 373 (1898), which was decided under the old statute, and the new statute was passed for the express purpose of overruling that case. A foreign corporation had been doing business in New York without obtaining the required certificate; it filed a mechanic's lien and immediately thereafter obtained the required certificate, and within the required ninety days began an action to foreclose the lien. In other words, it had fully complied with the statute before the beginning of the action. The concluding clause of the old law is as follows: "No foreign corporation doing busi-"ness in this State without such certificate shall "maintain any action in this State upon any con-'tract made by it in this State *until* it shall have "procured such certificate."

At Special Term the Trial Judge held that the prohibition of the statute was absolute. The General Term reversed "upon the reasoning that *by* "*virtue of the concluding clause* of the section a con-"tract, although prohibited, might become, never-"theless, enforceable by an action when the certi-"ficate was procured." The Court of Appeals merely held with the General Term, stating at page 377:

"The inhibition operated upon the remedy, BUT "WAS LIFTED, if the delinquent corporation was able "to procure the issuance by the Secretary of State "a certificate entitling it to do business here. * * * "The concluding clause of Section 15, which pre-"scribed the consequences to follow upon a failure "to comply with the statute, qualified the *absolute* "*nature of the earlier prohibitory declaration,* and, "unless it were given that effect, it could have no "practical operation."

The case of 155 N. Y., 373, depends exclusively on the concluding clause of §15, since repealed.

In other words, this old statute, the weakest of all the statutes of any State, was held not to hold the contract void, by reason of the express wording

of the statute itself. A new law was passed for the express purpose of reversing this condition, and in the plainest kind of English states that the illegal contract having once been entered into can never be enforced, no matter what action may be taken on the part of the foreign corporation, and in so doing, the statute merely goes back to the common law.

We repeat that the law of the State of New York on this point has been so firmly established for so many years, that although nearly four years have now elapsed since the passage of the New York statute in 1901, no case has appeared in any Court to test this principle of law which was enunciated with so much vigor in 1856.

We have searched in vain for any New York case in any court, high or low, that held the principle maintained by the New Jersey Court of Errors and Appeals.

Permit us to suggest, too, that the law laid down by the New Jersey Court is wholly at variance with the text books and encyclopædias.

Am. & Eng. Enc. Law, Vol. 13, title "Foreign Corporations," page 881, states: "If a contract by a "foreign corporation is not *enforceable* in the State "where made, because of noncompliance by the cor- "poration with the statutory conditions precedent "to doing business in that State, it has been held "that the contract *will not be enforced* by the Courts "of another state." At page 880, the Encyclopædia states that where "the statutes imposing conditions "expressly declare that no suit shall be brought on "a contract or obligation made in violation thereof, "there can *be no room for any other construction* "than that the contract will be *void* so far as the "right of the corporation to enforce it is concerned."

The New Jersey Court is wholly in error, therefore, in holding that under the decisions in the State of New York, the contract was not void and may be enforced either in New Jersey or elsewhere, although unenforceable in New York.

The appellants maintain that the contract is not only void, but if not void and only unenforceable, nevertheless it should not be enforced without, any more than within, the limits of the State of New York; that is, the enforcement of a contract is to be governed by the *lex loci contractus* and the friendly States in this Union will not enforce a contract that is unenforceable at home.

"The validity and *enforceability* of a contract by "a foreign corporation, are determined, not by its "charter, but by the law prevailing where the con- "tract is made" Cook on Corporations, §§696-700, page 1673.

It is not a *sine qua non* that there should be a specific case interpreting a specific statute when the principles of law involved are firmly established, and the wording is so plain that any grammar school boy can understand it. The New Jersey Court of Errors and Appeals does not say that the New York statute does not as plainly say that the prohibited contract is *unenforceable* forever in the courts of New York, as any number of decisions of the Court of Appeals could say it. On the question of non-enforceability, the New York statute needs no more interpretation than a primer. The law of comity does not require the Court of Appeals to interpret the command: "Thou shall not sue." It is as plain as the alphabet.

The New Jersey Court states at page 24 (of "Addition"):

"The New York statute does not in terms declare "the contract void, it provides that *no suit on it "shall be maintained* in that State. No case has "been brought to our attention in which the Courts "of New York have held that under the statute as "it now exists, the contract made in that State is "void. • • •

"The New York Legislature had the exclusive "right to declare what consequences should follow "the failure to comply with the law in order to "secure effective control over the business, and

"having in the act provided for no penalty on the "foreign company other than denial of the right "to maintain an action in New York, the Courts of "this State should not penalize the foreign cor- "poration to a greater extent by declaring the "contract void, or by increasing the disability im- "posed by the New York act. State laws have no "extra territorial effect for the enforcing of "penalties."

We deem this to be absolutely bad law. No State has ever presumed to insult her sister States by saying that no suit shall be maintained on a prohibited contract at home or abroad; it would be the height of presumption. Once admitting, as the New Jersey Court does, that the contract is unenforceable in New York, comity requires that it be unenforceable in New Jersey. Besides, New Jersey overlooks the common law and a long line of New York cases wherein prohibited contracts are declared to be void. A prohibited contract is not to be classed with penalties, like fines for illegal fishing. Allen & Co. are not seeking to enforce a New York penalty in New Jersey; the Alleghany Company is seeking to enforce an illegal contract.

New York is more considerate of its sister's rights than New Jersey. In Angel v. Van Schaick, 132 N. Y., 187, a Pennsylvania broker sold real estate in Pennsylvania without obtaining a broker's license. The Pennsylvania statute prohibited the broker from engaging in that business under a penalty of $500 fine. The statute did not say that the broker could not recover his commissions, but the Pennsylvania Courts had held that the broker "cannot recover compensation or com- "mission for his services." The New York Court held that the broker could not recover in the New York courts. It was not a question of void or valid contracts—merely their *enforceability,* and certainly when a New York statute says in plain English that a contract cannot be enforced, a New Jersey Court must follow the New York statute, which is just as binding as a New York decision.

(2) Pleading the Pennsylvania Statute.

(*a*) The position taken by the New Jersey Court of Errors and Appeals that the answer does not contain "allegations which show that the said "*promissory note* was given in pursuance of busi-"ness carried on in the State of Pennsylvania and "not in consummation of a single transaction" is a thunderclap from a clear sky. It was not raised in the court below, nor did it appear in the respondent's "specifications of causes of demurrer," in the brief or argument before the Supreme Court, or the Court of Errors and Appeals. Such a defect, if it exists, could not be raised on appeal by the plaintiff itself (Dohl v. Montana Copper Co., 132 U. S., 264; Girm v. New England Mortgage Security Co., 92 Ala., 135), and it could not, therefore, be raised on the part of the Court. If the defendants' attorneys had had an opportunity to argue that point, they might have pointed out to the New Jersey Court the fallacy of its position. That point has never been raised or argued in any brief.

We think the Justices of the Supreme Court will, in analyzing the two pleas, relating to the New York and Pennsylvania statutes, look in vain for any difference. The attorney who drew the answer supposed he was drawing the pleas exactly alike, and no counsel on either side has ever discovered a difference. The Court of Errors and Appeals says: "The only averment to bring the plaintiff within the "penalty of the act is that at the time of making the "said *note* the plaintiff did business in the State of "Pennsylvania contrary to the form of the statute.

"There is no intimation in this plea, certainly no "allegation, that this note had any connection with "business unlawfully transacted in Pennsylvania, "or that it was given for goods sold and delivered "in Pennsylvania.

"The demurrer *admits that the note was given in "Pennsylvania and it also admits that at the time "the note was given the plaintiff did business in the*

"*State contrary* to its statute, but it does not admit "that of that unlawful business this note was a part. "The admitted averment may be true, and yet the "*note* may have been given for an obligation con- "tracted out of the State of Pennsylvania, and con- "sequently not in violation of its laws."

Permit us to say in answer that, if the action is brought on a promissory note, the giving of the note is the transacting of business just as much as a sale of lumber. It will not be maintained that a corporation takes notes for its amusement, not as a business transaction, and the opinion states that the demurrer admits that the note was given (this one act of business done) in the State of Pennsylvania, while the company "did business" in that State.

However, the opinion misstates the pleading; no plea of the answer anywhere makes use of the word "note" or "promissory note" referred to in the declaration. The words of the answer follow: "That "at the time of the making of the said *promises* "*and undertakings* in the plaintiff's declaration set "forth * * * the plaintiff was a corporation," &c. * * * "And the defendants further aver "that the SAID PROMISES AND UNDERTAKINGS IN THE "PLAINTIFF'S DECLARATION SET FORTH were not made "in the State of New Jersey, but WERE MADE IN THE "STATE OR COMMONWEALTH OF PENNSYLVANIA, and "that it was then and there provided by the statute "of the said State or Commonwealth of Penn- "sylvania in such case made and provided that," &c. * * *

"And the defendants further aver that *at the* "*time* of the making of the *said promises and un-* "*dertakings* in the plaintiff's said declaration set "forth (that the plaintiff had not filed its certificate, "&c.), * * *

"And the defendants further aver that notwith- "standing the said premises the said plaintiff *at the* "*time* of the making of the said *promises and under-* "*takings* in the plaintiff's declaration set forth * * *

"*did business* in the said State or Commonwealth of "Pennsylvania *contrary to the form of the said stat-* "*ute* of the said State or Commonwealth of Penn- "sylvania in such case made and provided.

"And the defendants further aver that by reason "of the premises the said *promises and undertak-* "*ings* in the said plaintiff's said declaration set "forth by the laws of the said State or Common- "wealth of Pennsylvania never were nor are bind- "ing on them, the said defendants, and are of no "force or validity," &c.

The plea does not mention the word "note" at all, yet one would infer from the opinion that no other word was used.

The answer alleges that every promise and every undertaking set forth in the declaration (p. 1 of "Transcript") [that comprehends everything sued upon] were made in the State of Pennsylvania. It would have been idle to have repleaded each and every allegation contained in the declaration and to have alleged that each and every one of these took place in the State of Pennsylvania.

We know of no broader allegation or more correct and concise pleading than the statement that all the "promises and undertakings *set forth in the* "*declaration* were made in the State of Pennsylva- "nia." The word "promises" includes more than the promise contained in a promissory note. It means every promise, direct or contingent, referred to in the declaration; and the word "undertakings" is certainly very comprehensive and would include not only the promissory note, but the purchase and sale that preceded it. No answer has to be more comprehensive than the declaration.

It is the tendency of modern times to simplify pleadings, and it is certainly at variance with modern methods to discourage conciseness. If the defendants had repeated every word contained in the declaration, they could not the more effectually have pleaded that everything sued upon was a Pennsylvania transaction then they have done in al-

leging that "all the promises and undertakings set "forth in the declaration" were made in the State of Pennsylvania in violation of law.

The "promises and undertakings" alleged in the declaration consist not only of the giving of a promissory note, but relate to goods sold and delivered; work, labor and services; money lent; money paid to the use of the defendants; money had and received; interest and forebearance, &c., &c., &c. (p. 1 of Transcript), in the prolix verbiage of common law pleading, which, fortunately, is now unknown in the State of New York. The word "note" is found only in the "notice" which amounts to a bill of particulars only and is not a part of the declaration.

We do not understand the object of that part of the opinion which quotes decisions to the effect that a single sale is not "doing business." That law has been established for so many years that it has become elementary, and every pleading is drawn with respect to decisions so well known. Therefore, when the answer states that the plaintiff "did business," or "was doing business," it uses this form of expression with reference to those decisions, which precludes the idea of "doing business" being a reference to a single act.

At first glance it would seem that the only alleged difference between the pleading of the New York and the Pennsylvania statutes is the use of the words "did business" in one, and "was doing business" in the other. We hope we are mistaken in this. We cannot make ourselves believe that this is the intent of the opinion, for every school boy knows that under the rules of grammar "did business" relates to continuous acts quite as much as "was doing business"; that is, we would say equally, "he did business for many years," and "he was doing business for many years." No correct grammarian, speaking of a single act would say, "he did business in the State of Pennsylvania," if he wished to indicate a single horse trade, instead of the busi-

ness of trading horses. He would say he did one piece of business, or one act of business, or had a business transaction in the State of Pennsylvania, on a particular date. Certainly, when a lawyer uses the words "was doing business," or "did business," he uses them with respect to the statute and controlling decisions which have decided that the words "doing business," and "did business" refers to a number of transactions. If they have this meaning in statutes they have the same meaning in pleadings. The position taken by the New Jersey Courts seems frivolous, and is certainly a misconception of correct pleading. The answer, stripped of all of its verbiage, simply states "that all "acts (all promises and undertakings) set forth in "the declaration and at issue in this suit, were done "in Pennsylvania, and while so done, this foreign "corporation was doing business in violation of "law." "Promises and undertakings" cannot be construed to mean one business transaction or some innocent transaction in some other State.

If the declaration mentions nothing but a promissory note, that promissory note is an act of business, and other transactions which make up its consideration are irrelevant. If the declaration refers to all sorts of transactions which culminated in the promissory note (as is the fact), then all of those transactions are referred to very explicitly in the answer.

When the answer states that "all the promises "and undertakings set forth in the declaration" WERE made in Pennsylvania at the time that the Alleghany Company did business there in violation of law, it is frivolous to intimate that these "prom-"ises and undertakings" MIGHT have been made innocently in New York. The answer says they *were* made in Pennsylvania, not that a "note" was made in Pennsylvania, which might have been given in some innocent transaction. The note itself was the transaction sued on and its consideration had no place in a pleading.

It is a harsh thing to say (but the United States Supreme Court is the protector of the weak against the strong, even against the highest State Courts), and we say it with many apologies, that the New Jersey Court has misstated the plea by assuming that it confines its terms to the word "note" which is not used at all, in order to erect a man of straw and then destroy it. The casual reader of the opinion would get an entirely false idea of the defendant's pleading.

It is respectfully maintained that giving a note is an act of business (admittedly transacted in Pennsylvania), and the answer alleges that while this act of business was being transacted, the plaintiff was doing business (generally) in violation of law. The declaration says nothing about the consideration of the note, and for the answer to have set out the consideration was unnecessary, and bad pleading. It would have been bad pleading to have alleged 1000 business transactions that constituted "doing business" in Pennsylvania during the year that the note was given. How does the Court know from the third defense that "goods sold" were the consideration of the note? As far as this plea goes, it may have been for borrowed money. But the broad language of the answer interpreted by, and referring to, the declaration, covers all possible business transactions, and affirmatively alleges that they all were made in Pennsylvania, while the plaintiff was doing business there illegally. The answer is technically correct, and the New Jersey Court puts words into the mouth of the defendants in order to create a fictitious issue.

(b) The alleged defect in pleading could not be raised for the first time on appeal.

"The rule is of almost universal application that "questions, of whatever nature, not raised in the "Trial Court will not be noticed on appeal, and

"that, too, irrespective of any stipulations to the con-"trary which counsel may enter into"2 Cyc., 661, citing N. Y., N. J. and Penna. cases; Consolidated Traction Co. vs. Behr, 59 N. J., L. 477; 37 Atl., 142; Cumberland Land Co. vs. Clinton Hill Lumber Mfg. Co., 57 N. J., Eq., 627; 42 Atl., 585.

"Objections and questions not raised in the Court "below, and there made the ground of exceptions, "will not be considered by the Appellate Court" Pepper & Lewis' Digest of Decisions (Penna.), Vol. 1, p. 894 and 67 cases cited.

"A question as to the sufficiency of a pleading "cannot be raised for the first time in the Court of "Appeals. It cannot consider a matter or subject "that has not been presented for adjudication and "determination by the subordinate Court. Delaney vs. Brett, 51 N. Y., 78." Bliss Ann. Code, 5th Ed., Vol. 2, p. 2176 *et seq.*, and scores of cases there cited. McGoldrick vs. Willets, 52 N. Y., 612; Whitman vs. Foley, 125 N. Y., 651.

In Dohl v. Montana Copper Co., 132 U. S., 264, it was held that incompetency of a foreign corporation cannot be urged for the first time in the United States Supreme Court.

In Campbell, etc., Co. v. Hiring, 139 Penna. St., 473, the defense alleged that the plaintiff was a foreign corporation and had not complied with the statute. It omitted to say that plaintiff was doing business in Pennsylvania; held insufficient.

This case clearly implies that the *only* insufficiency was in failing to plead that plaintiff was doing business in the State, not that the transaction in question was a part of such "doing business."

See also Finch v. Travelers Ins. Co., 87 Ind., 302.

"Had the answer alleged a want of compliance "with our laws in this respect, it may be that the "defense could have been met and overcome by "proof to the contract. In any event, the question "cannot be raised for the first time in this Court, "and the lower Court put in error upon a matter "not involved in the decree it rendered." Ginn v. New England Mtg. Security Co., 92 Ala., 135.

(c) The plaintiff must stand or fall by "Specifi-"cation of Causes of Demurrer," found on page 15 of "Additions," as follows:

"The second plea is not sufficient in law, because "the *statute* of the State of New York therein stated "does not render the contract made in the State "of New York by a foreign corporation that has "failed to procure the certificate referred to in that "statute, void, but *only forbids their maintaining a "suit in the State of New York upon such contract.*

"The third plea is not sufficient in law, because "the statute of the State or Commonwealth of Penn-"sylvana therein stated does not render the con-"tract made in the State or Commonwealth of Penn-"sylvania by a foreign corporation that has failed "to procure the certificate referred to in that statute "*void,* but simply renders the persons, agents, of-"ficers or employees of such foreign corporation "subject to the fines and punishment mentioned in "said statute."

There is no intimation in these "specifications" that there is any fault with the pleading—else the answer might have been amended. The only fault complained of by the plaintiff is the *statutes* of New York and Pennsylvania.

POINT VIII.

The Fourth Defence--The Merits.

A casual reading of the testimony and exhibits will reveal the perfidy of the Alleghany Company. It should not prevail either in good morals or good law. Its representative was chairman of the creditors' meeting and a member of the examining committee which confirmed Allen & Co.'s statement showing about 7 per cent. in assets, and recommended the acceptance of the offer of 20 per cent.

On the strength of that recommendation the other creditors accepted 20 per cent.

Acting under secret telegraphic instructions, the plaintiff's representative discovered this house in New Jersey standing in Mr. Allen's name (a part of the 7 per cent.) and attached. It was months before this attachment was known; then by a series of false statements by plaintiff and a mistake as to the exact date of the attachment, the four months period expired, and Mr. Allen could not effectually carry out his promise to go into bankruptcy, as promised at the creditors' meeting, and thus prevent any preference among creditors.

The plaintiff's business methods were such as are abhorrent to the American business conscience. Not only in its underhand methods but in its efforts to avoid taxation. Having a nominal residence in North Carolina and a headquarters in Pennsylvania and doing business in other States, it files no certificates required by law, and thus, probably, avoids taxation everywhere.

Recapitulation.

1. A contract prohibited by statute is void when attempted to be enforced by the offending party.

2. It is admitted that the New York statute "provides that no suit on it shall be maintained in that state" (N. Y.) (top p. 24 of "Addition"), *i. e.,* the contract is forever *unenforceable* in New York.

3. A contract unenforceable in New York is unenforceable everywhere (Ford vs. Buckeye State Ins. Co., 6 Bush [Ky.], 133; 99 Am. Dec., 663).

4. The law makes no practical distinction between prohibited, illegal, unenforceable and void contracts, nor between contracts *malum in se* and *malum prohibitum,* especially when sought to be

enforced by the offending party, relying upon the prohibited contract.

5. By a long line of New York decisions a contract prohibited by statute is void.

6. It being admitted that the contract at issue is prohibited by statute, and unenforceable in New York (top p. 24 of "Addition") no New York decision is required, holding that contracts under this specific statute, are void. The statute, being unambiguous and its meaning admitted, is as binding upon the New Jersey Courts as a decision.

7. The principles of law, laid down in New York decisions for nearly a century are as binding on the New Jersey Courts as a specific decision on a specific statute. In New York, prohibited contracts are void.

8. The present New York statute is merely declaratory of the common law; a prohibited contract is unenforceable.

9. The old New York statute was contrary to the common law and 155 N. Y., 373, depended upon the express wording of the statute which did away with the penalty of the common law which declared a prohibited statute to be void.

10. The New York statute of 1901 expressly repealed the old law and was intended to "supersede" 155 N. Y., 373 (Black on N. Y. and N. J. Corporations [1904], p. 45d).

11. The New Jersey Court is in error in enforcing in New Jersey a contract admittedly unenforceable in New York simply because no specific decision has interpreted this specific statute and decreed the contract to be void.

12. The New Jersey Courts go too far in saying that an admittedly unambiguous statute, declaring a contract unenforceable, will be enforced in New Jersey; an unenforceable and void contract are the same.

13. The loose interpretation given to certain weak, prohibiting statutes by certain Colorado, Dakota and United States Courts are bad law and should be overruled. Besides, they have no relation to New York, New Jersey or Pennsylvania statutes, and have never been followed by any New York, New Jersey or Pennsylvania decision. The United States Supreme Court should settle forever the fundamental fact that prohibited contracts are void and are unenforceable in any State or United States Court.

14. The New Jersey Court is in error in reading into the defendants' answer the word "note" and thus predicating an argument on a false premise. The defendants' answer is technically and artificially correct. It alleges that every promise and undertaking set forth in the declaration was made in Pennsylvania, while plaintiff was doing business there illegally. The answer does not mention a note, but includes all acts set forth in the declaration including "goods sold" "money lent," &c., &c.

15. The Supreme Court of New Jersey sustained the demurrers on the ground that defendants' attorney disclaimed an appeal to comity, which disclaimer the attorney repudiated.

The Court of Errors and Appeals sustained the demurrer to the pleading of the Pennsylvania statute by misreading the answer and alleging an infirmity not thertofore raised.

16. The Alleghany Co. could not have sued in New Jersey on this claim, if it had arisen in New

Jersey (Wolf vs. Lancaster, 56 Atl. Rep. [N. J.], 172). It should not, therefore, be permitted to sue in New Jersey if barred from the Courts of New York under rules of comity and the Constitution and Statutes of the United States. The merits and the law are wholly with the defendant and the judgment of the New Jersey Court should be reversed.

ALEXANDER S. BACON,
37 Liberty Street,
New York.
Of Counsel for Allen & Co.,
Plaintiff in Error.

Federal Question!

Pleadings - 24 How 413

Not interpretation of Statute,
but its enforcement.

119 U.S. 615. 607. p. 16 24

United States Supreme Court.

THE ALLEGHANY COMPANY,
Defendant in Error,

vs.

ISAAC N. E. ALLEN and ano.,
Plaintiffs in Error.

POINT III.

Comity.

We doubt if the discussion of comity is at all proper in this connection, but the Supreme Court of New Jersey invoked it as a foundation for sustaining the demurrers.

As far as State statutes are concerned, the law of comity has been merged in § 1, Art. IV of the Constitution, and the indefinite "Private International Law" or comity has become fixed in our fundamental law. Moreover, the law of interstate comity as applied to "public acts," and crystallized in the Constitution, has been interpreted very forcefully in Chicago & Alton R. R. v. Wiggins Ferry Co., 119 U. S., 615, as follows:

"The constitutional requirement that 'full faith "'and credit shall be given in each State to the "'public acts, records and judicial proceedings of "'every other State' implies that *the public acts of "every State shall be given the same effect by the "Courts of another State that they have by law and "usage at home.*"

There can be no question that this quotation disposes of the demurrer to the second defense, setting up the New York statute, for the New Jersey Court admits (p. 24 of "Addition") that "the New "York statute * * * provides that no suit on "it shall be maintained in that State," *i. e.*, the prohibited contract is *unenforceable* at home where made. But to use the language of 119 U. S., 615, "the public acts of every State (N. Y.) shall be "given the *same effect* by the Courts of another "State (N. J.) that they have by law and usage at "home," *i. e.*, a contract prohibited by statute is unenforceable in New Jersey as well as New York.

POINT VII.

The New Jersey Opinion.

The writer first appeared as counsel in this litigation before the Court of Errors and Appeals, preparing the brief and making the argument. He has just re-read the respondent's brief before that Court and finds that it makes no reference whatever to any infirmity in the pleadings. The writer had no intimation of such alleged infirmity until he saw it in the opinion of the Court of Errors and Appeals and was led to believe from the "'pecifications of Causes of Demurrer" at top of page 15 of "Transcript," that it was the foreign *statutes*, not the pleadings that were claimed to be at fault (see p. 59 of Brief).

POINT IX.

Federal Questions.

The pleadings indicate that a federal question is involved. The answer sets forth the statutes in

full and alleges that by reason of these statutes the plaintiff ought not to prevail. Under the demurrer the statutes are admitted the same as if proved on the trial. In other words, the answer alleges affirmatively the foreign statutes and asks that they be given full force and effect in the State of New Jersey as in the States of Pennsylvania and New York. We have never known a case where a pleading of this character set out Section 1 of Article IV, for the very good reason that every pleader expects justice in the lower court.

"Public acts" (§ 1; Art. IV) include State statutes.

> Finney v. Guy, 189 U. S., 335;
> Manley v. Park, 187 U. S., 547;
> Chicago & Alton R. R. v. Wiggins Ferry Co., 119 U. S., 615.

A *mere* question of the construction of a statute of another State does not present a federal question.

> Johnson v. N. Y. Life Ins. Co., 187 U. S., 491.

This rule is not absolute, and the true rule is laid down in Finney v. Guy, 189 U. S., 335, where it is said:

"Where a case turns upon the construction by a "State Court of a statute of another State, and not "upon the validity of such statute, a decision on "that question is *not necessarily* of a Federal "character. *It depends upon the particular facts "of each case,* and the manner in which they are "presented, how far such questions can be regarded "as coming under the full faith and credit clause "of the Constitution."

A hard and fast rule that the construction of the statutes of one State by the Courts of another do

not present a federal question might lead to a practical nullification of Section 1, Article IV, and we take it that this case is one where an erroneous construction of the statute of another State is legal error that should be corrected by the U. S. Supreme Court.

Allen & Co., a New York firm, entered into a contract in New York, with a foreign corporation; such contract was made with reference to, and subject to, the limitations of a New York statute. Allen & Co. are entitled—not as a favor—but as an absolute right, to the full protection of that statute and of the Constitution of the United States. The Constitution *guarantees* to them the absolute right of the *real* New York statute "being given the same effect by the Courts of" every State. The Constitution does not say that full faith and credit shall be given to the public acts of every State in accordance with the construction of the statute that any State may see fit to make. Allen & Co. cannot thus be deprived of their absolute rights under the *real* New York statute. The erroneous judgment of the New Jersey Court cannot repeal the New York statute and Section 1, Article IV of the Constitution at the same time. As far as Allen & Co. are concerned, the New Jersey Court has repealed the New York statute by an erroneous construction. Well may we paraphrase a current saying: "I care not who makes the laws of the land, if I be permitted to construe them." "Construction" is the instrument made use of by New Jersey to circumvent Section 1, Article IV and prevent full faith and credit being given to a public act of New York.

What the *real* New York statute is is to be determined, first, by the Courts of the State of New York, and untimately, by the United States Supreme Court, which is the final arbiter of all laws.

What the Constitution guarantees to Allen & Co. under the New York statute is not a question of construction; it is a question of fact; and if the New Jersey Court by an erroneous construction of a New

York statute, deprived Allen & Co. of their absolute right to have full faith and credit given to the real New York statute, it becomes necessary for the United States Supreme Court to step in and determine the question of fact as to what is the real New York statute; otherwise the protection of the Constitution may be annulled.

We learn from U. S. vs. Alger, 152 U. S., 384, that "where the meaning of the statute appears to this "Court to be perfectly clear, no practice inconsistent "with that meaning could have any effect," and if it should appear to this Honorable Court that the wording of the New York statute is perfectly clear, and that, under a line of decisions in the State of New York running through a hundred years, a contract prohibited by law is absolutely void, then it would be the duty of the Supreme Court to step in and say to the State of New Jersey, "You shall not "repeal the New York statute and enforce a contract "in New Jersey that is absolutely void in New York. "We will require New Jersey to give a true construction (full faith and credit) to the New York statute."

In other words, nothing can repeal the New York statute and the Constitution, excepting the New York Legislature and the people of the Union. Neither can be repealed by indirection, or by a false construction of any Court. Nevertheless, the State of New Jersey has, in effect, nullified the New York statute and the Constitution when an action is brought in New Jersey, by giving it a construction that is wholly erroneous.

Construction of the State Statutes.

There is no question of the construction of the Pennsylvania statute. The New Jersey Court admits that the contract is absolutely void under the Pennsylvania law.

There is no question of the construction of the New York statute in so far as the prohibited con-

tract is held "unenforceable" in New York. That much the New Jersey Court admits.

We do not abandon the position that there is no difference between an unenforceable and void contract. A contract is unenforceable because it is void, and it is void because the statute says it shall not be enforced.

If we be right that New Jersey has no more right to enforce an unenforceable contract than it has a void contract; or if an unenforceable contract is void; or if, under the New York decisions, the contract in question is absolutely void, then the State of New Jersey has not given full force and effect to the New Jersey statute. That is a *fact,* and it does not matter by what means that fact is accomplished; it is a violation of Section 1, Article IV. A man is just as dead whether he knew the gun was loaded or not, when he blew down the barrel. The effect on the real New York statute and on Allen & Co. is just the same, whether the New Jersey Court misconstrues the statute through ignorance or design. We deem it to be a self-evident proposition that ignorance of the law on the part of a Court has no more effect in destroying rights under a statute and the Constitution, than ignorance of the same law by a lawyer, and it is as much the duty of the Supreme Court to detect ignorance in one direction as in another.

The argument that the New York statute says that no action shall be maintained on the contract "in this State" implies that it might be enforced elsewhere, needs no answer. It would be the height of presumption for New York to put into a statute that a contract should not be enforced in another State. And we know of no similar statute which says, in terms, that such a contract is void.

The old New York law was similar to the present Indiana law, and a large number of Indiana cases have held that contracts under that law are void and unenforceable.

Sufficiency of Pleadings.

We are aware that the sufficiency of a pleading does not, in general, present a federal question. However, if an erroneous interpretation of a pleading has the effect of repealing a State statute, rather than enforcing it and giving it full faith and credit, it necessarily becomes a federal question, just as in the case of the erroneous construction of a statute. The New Jersey Court cannot be permitted to interpret away the law. The United States Supreme Court is the house of refuge to which all the oppressed run to get exact justice. As far as Allen & Co. are concerned, the New Jersey Court has repealed the Pennsylvania statute by what we deem to be a false interpretation of the pleading. Allen & Co. have absolute rights under Section 1 of Article IV, and the Pennsylvania statute, and it is the duty of the United States Supreme Court to enforce those rights when they are denied in any way whatsoever.

The answer is as broad as the declaration. If the declaration alleges goods sold, so does the answer. If the declaration refers to a note only, the answer refers to nothing more. If the declaration refers to a note only, the giving and receiving of that note was an act of business; otherwise it could not be sued upon. You cannot sue upon an act of amusement. If the Alleghany Company transacted even a minute piece of business with Allen & Co. in the State of Pennsylvania, while their headquarters were in that State, and they were transacting business there, then the statute prevails, and the contract is void.

It must be left to the trial to determine whether this is a New York or a Pennsylvania contract. It may be either or both. The sale may have been in one State and the note given in another. As nearly everything was done by letter, this question would probably be determined by the Court, not by the jury.

A question of one member of the Court suggested a doubt as to whether a State statute simply declaratory of the common law could be made the subject of a federal question. The answer is that statutes are statutes, and the Constitution makes no distinction as to varieties of public acts. Moreover, there is the strongest possible argument for giving full faith and credit to a statute that conforms to the common law even more than to one which might be different from the common law, and thus give rise to an excuse for a variety of interpretations.

Respectfully submitted,

ALEXANDER S. BACON,
Of Counsel for Plaintiff.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

Office Supreme Court U. S.
FILED
JAN 6 1905
JAMES H. McKENNEY,
Clerk

No. 119.

ISAAC N. E. ALLEN AND ALEXANDER S. BACON,

Plaintiffs in Error,

vs.

THE ALLEGHANY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF OF DEFENDANT IN ERROR.

JAMES A. GORDON,
Of Counsel.

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The defendant in errror contends:

First—This Court has no jurisdiction. Full faith and credit were given by the New Jersey Court to the statutes of the States of New York and Pennsylvania. The case turned upon the construction of these statutes. Their validity was not called in question.

See opinion of New Jersey Court of Errors and Appeals, page 21, of Stipulation and Addition to Record.

Johnson v. New York Life Insurance Co., 187 U. S., 491.

Bauholzer v. New York Life Insurance Co., 178 U. S., 402.

Lloyd v. Matthews, 155 U. S., 222.

Glen v. Garth, 147 U. S., 360.

Second—Under the New York statute, a contract made in New York by a foreign corporation, not complying with the provisions of the act, cannot be enforced in the State of New York, but the statute does not make the contract void, or prevent its enforcement in any other Court.

The New Jersey Court fully considered this statute and construed it after referring to the decisions of the New York Court of Appeals and other decisions which seemed in point, and which are cited in the opinion of the New Jersey Court of Errors, page 24 of "Stipulation and addition to record."

In addition to the cases cited in the opinion, see the case of Fritz v. Palmer, 132 U. S., 282. Whether the State Court construed the statute correctly is not subject to review in this Court.

Third—The third plea, which sets up the Pennsylvania statute, fails to allege that the note upon which this suit is founded had any connection with business unlawfully transacted in Pennsylvania, within the meaning of the statute, and for this reason the New Jersey Court sustained the demurrer to this plea.

The Court of Errors and Appeals of New Jersey gave the Pennsylvania statute the same construction given to it by the Pennsylvania Courts, but decided that the plea did not contain sufficient allegations of fact to bring the note in suit, within the prohibition of the statute.

The decision of the New Jersey Court was correct, but on this question of pleading, the decision of the State Court is not reviewable in this Court.

(See opinion of New Jersey Court of Errors and Appeals, page 25 of "Stipulation and addition to record.")

Fourth—The statutes pleaded have no extra territorial effect, except upon principles of comity; and the plaintiffs in error, on the argument before the New Jersey Supreme Court, having disclaimed that the principles of comity were involved in the case, cannot now rely upon them.

(See opinion of New Jersey Supreme Court, page 15, of "Stipulation and addition to record.")

JAMES A. GORDON,

of Counsel with Defendant in Error.

Supreme Court of the United States.

No. 119.—October Term, 1904.

Isaac N. E. Allen et al., Plaintiff in Error, vs. The Alleghany Company. } In error to the Supreme Court of the State of New Jersey.

[February 20, 1905.]

This was a suit begun in the Supreme Court of New Jersey by the Alleghany Company, to recover the amount due upon a promissory date lated at New York, July 16, 1900, given by the plaintiffs in error, under the firm name of I. N. E. Allen & Co., for $1,989.54, upon which payments amounting to $1,000 were endorsed. The declaration was upon the common counts, but annexed was a copy of the note, with a notice that the action was brought to recover the amount due thereon. The defendants pleaded four several pleas:

1. General issue.

2. That the note was executed and delivered in the State of New York to the plaintiff company, a business corporation created under the laws of North Carolina. That when said note was executed and delivered it was provided by the statute of the State of New York that—

"No foreign corporation . . . shall do business in this State without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this State, and that the business of the corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State. . . . No foreign stock corporation doing business in this State shall maintain any action in this State, upon any contract made by it in this State, unless prior to the making of such contract it shall have procured such certificate."

The plea further averred that at the time of the making of the note the plaintiff was a business stock corporation, foreign to the State of New York, and had not theretofore procured from the Secretary of State a certificate that it had complied with all the requirements of the law to authorize it to do business within the State, and that the business of said plaintiff was such as might be lawfully carried on by a corporation incorporated under the laws of said State for such or similar business, according to the form of the statute of New York in such case made and provided.

3. The third plea sets out that the note was made and executed in the State of Pennsylvania to the plaintiff company, a foreign corporation created under the laws of North Carolina.

That when said note was executed and delivered it was provided by the State of Pennsylvania that—

"1. No foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein. 2. It shall not be lawful for any such corporation to do any business in this Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth a statement under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its attorney, agent or agents therein, and the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement shall be preserved for public inspection by each of said agents in each and every of said offices. 3. Any person or persons, agents, officers or employees of any such foreign corporation, who shall transact any business within this Commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment, not exceeding thirty days, and by a fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same."

The plea further averred that at the making of the note the plaintiff was a corporation foreign to the said Commonwealth, and had not theretofore filed in the office of the Secretary a statement showing the title and object of said plaintiff, the location of its office, and the name of its authorized agent therein, according to the form of said statute; yet notwithstanding the premises, the plaintiff at the time of the making of the said note did business in the said Commonwealth of Pennsylvania, contrary to the form of the said statute.

The plaintiff demurred to the second and third pleas, and the demurrer being overruled, the cause was sent down to the Circuit Court of Hudson County for trial on an issue of fact raised by the fourth plea, which is not material here.

The trial judge there directed a verdict for the plaintiff, and upon appeal to the Court of Errors and Appeals of New Jersey the judgment of the lower court was affirmed. (69 N. J. Law, 270.)

Mr. Justice BROWN delivered the opinion of the Court.

The defendants, plaintiffs in error here, pleaded that the note upon which suit was brought was executed in the State of New York, and that under the laws of that State no foreign corporation could do business there without a certificate of the Secretary of State that it had complied with all the requirements of law to authorize it to do business there; and that no such corporation could maintain any action in that State unless, prior to the making of such contract, it had procured such certifi-

cate; that plaintiff was a foreign corporation within the meaning of the law, and had not procured a certificate.

The third plea was similar in terms, averring the note to have been made in Pennsylvania, whose statutes provided that foreign corporations should do no business in the State without filing a certain statement in the Secretary's office and procuring the certificate of the Secretary of the Commonwealth, and further providing that the agent of any foreign corporation transacting business within the State, without complying with the provisions of the law, should be deemed guilty of a misdemeanor. The plea also averred non-compliance with those provisions.

Both the Supreme Court and the Court of Errors and Appeals held that a contract made in contravention of these statutory regulations, though not enforcible in the courts of New York and Pennsylvania, was not *ipso facto* void, and might be, notwithstanding such statutes, enforced in New Jersey.

Plaintiffs in error insist that by this ruling full faith and credit was denied by the courts of New Jersey to the statutes of New York and Pennsylvania, in contravention to section 1, article IV, of the Constitution.

By section 709 of the Revised Statutes, authorizing writs of error to the State courts, it is declared that final judgments, where is drawn in question the *validity* of a statute of any State, or any authority exercised under any State, on the ground of their being repugnant to the Constitution, &c., and the decision is in favor of their validity, may be re-examined here.

But the validity of these statutes was not denied. The case turned upon their construction and the effect to be given to them in another State. The New York statute directly, and the Pennsylvania indirectly, forbade the maintenance of actions "in this State." The Pennsylvania statute made it a misdemeanor to transact business without complying with the law. Neither statute declared the contract so made to be void, and it was apparently upon this ground that the New Jersey courts held that the case did not fall within those decisions, wherein it is declared that a contract void by the *lex loci contractus* is void everywhere.

In several cases we have held that the construction of a statute of another State and its operation elsewhere did not necessarily involve a Federal question. The case is practically governed by that of the *Chicago & Alton R. R. Co.* v. *Wiggins Ferry Co.*, (119 U. S. 615.) In that case suit was brought in a State court by the ferry company against the railroad to recover damages for not employing the ferry company for the transportation of persons and property across the river, as by its contract it was bound to do. The defendant pleaded that it had no power to make the contract; that the same was in violation of the laws of Illinois, contrary

to the public policy thereof and was void. The statutes were put in evidence, but their construction and operative effect were disputed. The Supreme Court of the State held that the contract was interpreted correctly by the court below, and that it was not *ultra vires*, contrary to public policy, or in restraint of trade. It was argued here by the railroad company that by law and usage of Illinois, the charter of the company in that State made the contract *ultra vires*. We held that the law of Illinois to that effect should have been proved as a fact, either by decisions of its courts or by law or usage in that State; that State courts are not charged with a knowledge of the laws of another State; but they have to be proved, and that while Federal Courts exercising their original jurisdiction are bound to take notice of the laws of the several States, yet this Court, when exercising its appellate jurisdiction from State courts, whatever was the matter of fact in that court is matter of fact here, citing *Hanley* v. *Donoghue*, (116 U. S. 1.) We said: "Whether the charter of this company in its operation on the contract now in suit had any different effect in Illinois from what it would have, according to the principles of general law which govern like charters and like contracts, in Missouri and elsewhere throughout the country, was, under this rule, a question of fact in the Missouri court, as to which no testimony whatever was offered."

No proof having been offered to support the averment that the contract was in violation of the laws of Illinois, the defence relying on the general claim that the contract was illegal, it was held that no Federal question was involved, and the case was dismissed. It was said that it should have appeared on the face of the record that the facts presented for adjudication made it necessary for the court to consider the act of incorporation in view of the peculiar jurisprudence in Illinois, rather than the general law of the land.

Since the above case we have repeatedly held that the mere construction by a State court of a statute of another State without questioning its validity, does not, with possibly some exceptions, deny to it the full faith and credit demanded by the statute in order to give this court jurisdiction. (*Glenn* v. *Garth*, 147 U. S. 360; *Lloyd* v. *Matthews*, 155 U. S. 222; *Banholzer* v. *New York Life Insurance Co.*, 178 U. S. 402; *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491; *Finney* v. *Guy*, 189 U. S. 335.)

The Court of Errors and Appeals, conceding the general rule both in New Jersey and New York to be that a contract, void by the law of the State where made, will not be enforced in the State of the forum, (*Columbia Fire Insurance Co.* v. *Kenyon*, 37 N. J. Law, 33, and *Hyde* v. *Goodnoe*, 3 N. Y. 266,) held that the State statute of New York did not declare the contract void, and that there was no decision in that State holding it to be so. In fact the only case in the Court of Appeals in New York, *Neuchatel Asphalt Co.* v. *Mayor*, (155 N. Y. 373,) is the other way. The

Court of Appeals in that case held that the purpose of the act was not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations; that no penalty for non-compliance was provided, except the suspension of civil remedies in that State, and none others would be implied. This corresponds with our rulings upon similar questions. (*Fritts* v. *Palmer*, 132 U. S. 282.)

With respect to the Pennsylvania statute, the court held that, although the Pennsylvania courts had held that a contract made in violation of the Pennsylvania statute was void, yet that the third plea did not contain allegations which showed that the note was given in pursuance of business carried on in Pennsylvania, and not in consummation of a single transaction; and although it was averred that plaintiff did business in that State, it was not averred that the note had any connection with the business carried on in Pennsylvania, or that it was given for goods sold in Pennsylvania. The admitted averments may be true, and yet the note may have been given for an obligation contracted out of the State of Pennsylvania, and consequently, not in violation of its laws. Construing the third plea most strongly against the pleader, the conclusion was that it disclosed no defence in the action. This was purely a local question, and is not assignable as error here.

Whether, aside from the Federal question discussed, the courts of New Jersey should have sustained this action upon principles of comity between the States, was also a question within the exclusive jurisdiction of the State court. (*Finney* v. *Guy*, 189 U. S. 335.)

The writ of error must, therefore, be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.